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NORTH CAROLINA REPORTS.

VOL. 66.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF NORTH CAROLINA,

JANUARY TERM 1872.

By W. M. SHIPP, Attorney General.

RALEIGH:
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1895.

JUSTICES OF THE SUPREME COURT,

AT JANUARY TERM, 1872.

RICHMOND M. PEARSON, C. J.
EDWIN G. READE.
WILLIAM B. RODMAN.
ROBERT P. DICK.
NATHANIEL BOYDEN.

KFN
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N6
v.66

JUDGES OF THE SUPERIOR COURTS.

FIRST CLASS.		SECOND CLASS.	
†Charles C. Pool,	1st District.	William A. Moore,	2d District.
William J. Clarke,	3d "	Samuel W. Watts,	6th "
Daniel L. Russell,	4th "	John M. Cloud,	8th "
Ralph P. Buxton,	5th "	Anderson Mitchell,	10th "
Albion W. Tourgee,	7th "	James L. Henry,	11th "
George W. Logan,	9th "	Riley H. Cannon,	12th "

†Jonathan W. Albertson was appointed by Governor Caldwell, in place of Charles C. Pool, resigned, April 18th, 1872.

ATTORNEY GENERAL,

WILLIAM M. SHIPP.

CLERK,

W. H. BAGLEY.

PREFACE.

The duty of reporting the decisions of the Supreme Court was devolved upon me during the last session of the General Assembly. I came to the discharge of this duty without previous experience, more especially in the *mystery* of proof-reading. Knowing the anxiety of the profession to obtain the decisions at an early day, I obtained assistance in preparing the cases and in the proof-reading.

As the proof came out after the Spring Courts were opened, much of it was done amidst professional engagements, and, as could have hardly happened otherwise, many typographical errors will be found. The reader will readily correct the most of them, which are collated in the *errata*. A few of importance will be found corrected by inserted slips. The cases of *Shields* v. *Stamps*, *Emery* v. *Lyon*, *Nelson* v. *Brigman*, and *Summers* v. *Aldred*, were ordered not to be reported.

To avoid delay in obtaining necessary plates for diagrams, the cases of *West* v. *Shaw*, from Harnett, and *Osborne* v. *Johnson*, from Wilkes, involving questions of boundary, were held over to be reported in the next number. Owing to the unusual number of cases reported (one hundred and sixty-three), and the appendix, &c., I thought it advisable to let this number form a volume. The index will be found to be very copious and though apparently voluminous, yet, I think, will meet the approval of the profession. I have restored the table of cases cited, as found in 63rd and 64th N. C. Reports.

Conscious of the imperfection of this my first effort, I ask the indulgence of the profession, hoping that in the future errors will be entirely avoided.

WILLIAM M. SHIPP,
Attorney General.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

JANUARY TERM, 1872.

MARTHA KANE *v.* EDWARD GRAHAM HAYWOOD.

In the matter of EDWARD GRAHAM HAYWOOD, AN ATTORNEY AND COUNSELLOR OF THIS COURT, *ex parte*.

1. An answer to a rule on an attorney of the Court to show cause why, under pain of contempt, he should not pay into the Court a sum of money received by him for a client, which admits the receipt and non-payment, but denies any application of it to his own use; which avers its loss, but in consequence of long continued drunkenness, respondent could not tell how; suggesting as a supposition, that respondent had burnt it or put it away in some secret place to prevent his destruction of it; and avowing an inability to find it after diligent search: *Held*, to be insufficient, and to authorize a further rule on respondent to pay the money into Court, or show cause why he should not be attached.

2. But a return to such second rule, which avows, that after making every effort to comply with the rule, it is out of respondent's power to do so; that he is wholly insolvent, has nothing wherewith to support himself and family; could obtain no aid from his friends and relations, and has no credit; and that in failing to perform the order, he intended no contempt of the Court, and deeply regretted his inability to do justice to his client: *Held*, to be sufficient, and entitled the respondent to be relieved from arrest and imprisonment, because the Court was satisfied that it was not in his power to pay the money into Court.

3. If a party is ordered to execute a deed and refuses to do it, he will be kept in jail until he does, for that is a thing which he can do. So, if an attorney, by false representations, procures his client for an inadequate consideration, to assign the cause of action, he will be imprisoned until he shall execute a release and re-assignment; but when a man is ordered to pay money into Court, and swears that after every effort, it is out of his power to pay any part of it, (in the absence of any suggestion to the contrary), that is an end of the proceeding; for the Court will not require an impossibility, or imprison a man perpetually for a debt, he having purged himself of the contempt.

4. In such a case, on a rule against the attorney to show cause why his

name should not be stricken from the roll, this Court, prior to the Act of the General Assembly, ratified April 4th, 1871, possessed the power to make such rule absolute, and would have felt it their duty to have taken that course.

5. By the proper construction of that Act, this Court is shorn of its power to disrobe an attorney, except in the single instance, where he has been *indicted* for some criminal offence, showing him to be unfit to be trusted in the discharge of the duties of his profession, and upon such indictment has either been *convicted or pleaded guilty.*

6. The Act of 1871 fails to provide any power to be used in the stead of the former power of the Court, and so is a disabling and not an enabling statute.

7. The words "convicted or in open Court, confessed himself guilty of some criminal offence," used in this Act, have acquired a technical meaning, and must be construed to convey the idea that the party has been convicted by a jury, or has in open Court, when charged upon an indictment declined to take issue by the plea of not guilty, and confessed himself guilty.

8. The admissions of an attorney made in an answer to a rule to show show cause why he should not be attached for contempt in failing to pay money into Court, which he wrongfully withholds, is not such a "confession in open Court," as is contemplated by the Act.

9. Such admission cannot be considered technically as a confession, because it is not voluntary as when one is charged on indictment, and confesses his guilt in open Court, but the respondent was compellable under heavy pains and penalties, to answer under oath.

10. To allow his answer to be used as a confession to establish guilt, would be objectionable as a means to conpel him *to criminate himself on oath*, and for such an inquisitorial proceeding there is no precedent in the Courts of any country which enjoys the rights guaranteed by the MAGNA CHARTA.

11. The wrongful retention of a client's money by an attorney, was, before the passage of the late Act, not a *direct*, but a *constructive* contempt, made so by the common law, to enable the Court to purge the BAR of unworthy members.

(3) 12. Whether this Court possesses the power to punish under the circumstances, by virtue of section 2, chapter 177, Acts of 1868 '69, for misbehavior as an attorney in his official character under paragraph 8, section 1, discussed, but no definite conclusion arrived at.

13. But, if it was clear that this Court has full power to punish, by fine and imprisonment, for a *constructive consequential* contempt, it might be questioned whether this Court, which was not created for the punishment of criminal offences, should, on mere motion, inflict such punishment, while the proceeding to disbar is suspended to await further preliminary steps, should any be taken, in the Superior Court.

14. Fine and imprisonment is not the *appropriate* remedy to be applied to an attorney, who, by reason of moral delinquency or other cause, has shown himself to be an unworthy member of the profession.

The cases of *ex parte Schenck*, 65 N. C. Rep., 253; *ex parte Moore*, 63 N. C. Rep., 397, and *ex parte Biggs*, 64 N. C. Rep., 202, cited and approved.

These were rules heard and determined at January Term, 1872, of this Court, and as the rule in the matter of E. G.

Haywood grew out of the preceding one, in *Kane* v. *Haywood*, it is deemed proper to report the cases together.

It appearing, to the satisfaction of the Court, from the report of the clerk, that EDWARD GRAHAM HAYWOOD, one of the attorneys of the Court, had, as attorney for Mrs. Martha Kane, received the sum of $4,496.22, and from the affidavit of Mrs. Kane, that he had, after repeated solicitations, failed to account for and pay the same over to her.

On motion of Moore & Gatling and Phillips & Merrimon, attorneys for Mrs. Kane, a rule was granted in the first named case on Col. Haywood to pay the said balance of $4,496.22 into Court.

This rule was made returnable on the 4th day of January, 1872.

At the return of this rule, Col. Haywood filed in Court the following answer thereto:

(4) In the matter of MARTHA KANE.

The respondent answering the rule herein, for answer thereunto, says:

That sometime about the close of the year 1867, or the beginning of the year 1868, Mrs. Martha Kane called on this affiant, at his law office in the city of Raleigh, and represented to him, that she was one of the heirs at law and next of kin to John Kane, deceased—was poor and helpless, resided in Ireland, and desired this affiant to act for her in obtaining possession and reducing to money her share of the said John Kane's real estate and personal property, and upon hearing her statement and questioning her, this affiant thought it probable that her statements were true and that she had legal rights, and undertook to investigate the rights further. Upon further investigation this affiant became satisfied that she had legal rights, and about the month of March, 1868, she having confessed her inability to pay this affiant a retaining fee, he took from herself and her husband, Thomas Kane, the power of attorney, bearing date February 6th, 1868, and herewith filed, whereby he, this affiant, became the agent and attorney in law and fact of the said Martha and Thomas, to receive the said Martha's share of the real and personal estate of John Kane, deceased, reduce the same to possession and account with them for three-fourth's of the value thereof, with powers also to supply such attorneys under him as he should see fit to conduct such business, and upon the receipt

of this power of attorney, this affiant agreed to become, and did become, such agent and attorney in law and in fact of the said Martha and Thomas, as is therein set forth and described.

This affiant avers that all moneys, property and estate, real and personal, which has come into his possession or under his control, for and in behalf of the said Martha and Thomas, have so come into his possession and under his control, in and by virtue of said instrument.

(5) After collecting evidence of the marriage of said Martha and Thomas, of the naturalization of the said Thomas, and taking numerous *ex parte* depositions to ascertain the genealogy of the Kane family, and to find out who were the next of kin and heirs at law of John Kane, deceased, and to identify the said Thomas Kane, with the Thomas Kane whose naturalization we were prepared to prove, which evidence had to be collected in Ireland, New York State, New Jersey and elsewhere, the collection of which consumed some eight or ten months and required a very extensive, laborious and voluminous correspondence, and to aid in which the said Martha, at the suggestion of this affiant, had retained and used the services of Moody B. Smith, Esq., counsellor and attorney at law, resident in New York City, this affiant supposed he would have been able to assert the said Martha and Thomas' rights, and to obtain possession of the money, property, and estate to which they were entitled, without suit, but the administrators of John Kane insisted that they had exhausted his personal estate in the payment of debts, except as much thereof as had been lost by the recent civil war or had perished or been destroyed by other inevitable accidents, and the persons in the possession of the real estate of which John Kane died seized and possessed, and which consisted of town lots in the city of Raleigh, and an undivided moiety of a plantation near Raleigh, in Wake county, refused to acknowledge the said Martha's rights.

The persons, who by their tenants under them, were in possession of the town lots in the city of Raleigh, claiming them as their own, were two infants, by name Francis Patrick McCarthey and Isabella McCarthey, and the mother of the said infants, by name Mary McCarthey, wife of Dennis McCarthey, claimed the same; also, asserting that she was a sister and heir at law of John Kane, deceased, and though born in Ireland and married to an Irishman, her husband

had been naturalized after their intermarriage and before the death of the said John Kane. The undivided
(6) moiety of John Kane, deceased, in the aforesaid plantation near Raleigh, had been sold under a license obtained from the Court of Pleas and Quarter Sessions of Wake County, by the administrators of John Kane, deceased, on a petition filed by them against Francis, Patrick and Isabella McCarthey, as the sole heirs at law of John Kane, deceased, for assets to pay debts and the said moiety was in the possession of the purchaser at said sales.

About the month of October, 1868, this affiant, without further consultation with the said Martha and Thomas, and claiming the right so to do under the aforesaid power of attorney, instituted a civil action, in the Superior Court of Wake county, in the name of the said Thomas and Martha Kane as plaintiffs, against the said Patrick and Isabella McCarthey, infants, and Dennis McCarthey and Mary, his wife, as defendants, to recover possession of the said Martha's share of the aforesaid town lots in the city of Raleigh, and to effect a division of the same among the parties entitled thereto, according to their respective rights which said action was eventually carried by appeal into this Court, where at January Term, 1869, it was held that the said Martha, as one of the heirs at law of the said John Kane, deceased, was entitled to an undivided moiety, of and in said town lots, and the said Mary McCarthey was entitled to the other undivided moiety, and by consent of the parties interested therein, it was adjudged that the said lots should be sold by the Clerk of the Supreme Court, and the proceeds equally divided between the said Martha Kane and Mary McCarthey, which sale was accordingly made, as directed, by the said clerk. The Court further decreed that the defendants, Francis, Patrick and Isabella McCarthey, should account for the rents and profits of said town lots which they had received since about the year 1866, and by an arrangement entered into, between this affiant and the counsel for the defendants, the amount of said rents was ascertained by consent, and the rents and profits and proceeds of sale of town lots were carried into one common account and fund, and the re-
(7) spective rights of the parties in said fund were ascertained by consent—the share of the said Mary McCarthey being charged with the amount of rents and profits, which had been received and consumed by her children,

Francis, Patrick and Isabella, all which will more fully and at large appear by reference to the proceedings in said action, now on file in this Court, and here referred to, for greater certainty.

Of this joint fund, consisting of the rents and profits and the proceeds of the sale of the said town lots, this affiant received in the aggregate, $9,902 30 in various payments, made from time to time, between the 2nd of April, 1869, and the 18th of March, 1870, by the Clerk of the Supreme Court to this affiant, as the representative of the said Martha and Thomas Kane, under and by virtue of the power of attorney aforesaid, which this affiant exhibited to the said clerk when he first began to draw the said fund, and left with said clerk a memorandum of the volumes and page of the book in the office of Register of Deeds in said county of Wake, wherein said power of attorney was registered: of this aggregate sum of $9,902.30, so received by this affiant as aforesaid, from the Clerk of the Supreme Court, aboat $2,543.98 was paid to this defendant in cash, and about $7,358.32 in well secured notes of individuals, which had been given to said clerk for the purchase money of said town lots, and were transferred by him to this affiant, which said notes this affiant collected and reduced to money by virtue of his authority under the said power of attorney, and this affiant has never received any other money for the said Thomas and Martha Kane, or either of them, and he received this sum, not because he was attorney of Record for the plaintiff in the aforementioned acions of Thomas Kane, and wife Martha plaintiffs, against Dennis McCarthey, and wife Mary and others, defendants, but under and by virtue of the power of attorney aforesaid.

Of this sum so received by this affiant, he held $2,475.57½ as his own by the terms of the said power of attorney, and was accountable to the relative, Martha Kane and her
(8) husband Thomas Kane, for the remaining three-fourths of said sum only.

On account of this remaining three-fourths he paid out the following accounts on behalf of the said Thomas and Martha: 1869. May the 28th. On or about this date, to J. N. Bunting, Clerk of the Superior Court of Wake county for Court costs, $32.65.

May the 31st. On or about this date he purchased from the State National Bank, of Raleigh, N. C., a check on the Bank of the Republic, N. Y., (No. 3621) for six hundred dol-

lars, which he transmitted to the said Martha Kane, then in New York, and for which this affiant paid $601.50.

July the 18th, 1870. On or about this date he paid to Judge Warren, Moody B. Smith's draft on him, this affiant, for services rendered to the said Martha Kane by the said Smith, as her counsel in New York, and which the said Martha had agreed should be paid out of her fund when collected by this affiant—amount $1,000.

August 29th. On or about this date, he paid the joint draft of the said Thomas and Martha Kane on him for $1,000.

September 24th. On or about this date, he paid a similar draft on him for $1,000. All these amounts were paid in cash, and this affiant files herewith his vouchers for said disbursements.

Since the said Martha has been in the United States, during her present visit to this country, and according to this affiant's recollection, sometime during the last of the Summer or the first of the Autumn of the year 1871, she has drawn drafts upon this affiant to the amount of $2,000 in two drafts of $1,000 each, in favor of some banking house in the city of Newark, N. J., the name of which this affiant cannot now recall, which drafts this affiant has accepted on account of the fund received under said power of attorney, and which he believes are now outstanding in the hands of said banking house. This affiant objected to accepting said drafts, because they were not signed by Thomas Kane,
(9) the husband of said Martha, as well as herself, and the said Martha had no evidence of his authority to produce, to justify said drafts, but he finally consented to accept the same; this affiant cannot state with certainty the dates when said acceptances fell due; one of them he thinks fell due in October, and the other in November, last past, and this affiant admits that he failed to pay the said acceptances at maturity, only because of the failure to receive funds which he had expected to have in hand in apt time for that purpose, but he has been informed by the said Martha since her arrival in this city in November, last past, that she has raised money on said acceptances, and that they are now outstanding in the hands of the aforesaid banking house, in Newark, as a security for money on said acceptances, and that they are now outstanding in the hands of the aforesaid banking house in Newark, as a security for money advanced to her.

This affiant has already mentioned the undivided moiety of a small plantation in Wake county, near the city of Raleigh, of which John Kane, died, seized and possessed, and which had been sold by the administrators of said John for assets, before the said Martha Kane's right as one of his heirs at law was established. After the decisions of the aforementioned actions of Kane and wife, *vs.* McCarthey and wife, and others, in the Supreme Court, this affiant succeeded in obtaining a surrender of possession of said real estate from the purchaser thereof, and in setting aside the sale which had been made of said undivided moiety, the said Martha Kane's share of said moiety still remains in specie and has never been disposed of by this affiant under his aforesaid powers of attorney, and this affiant cannot say certainly what is its value, but according to the best of this affiant's recollection, when the whole of said moiety was sold as aforesaid for assets, it brought about $2,800 or $3,000 on said sale, and this affiant insists that in any settlement he may have with the said Thomas and Martha Kane, he is entitled to a credit of one-fourth of the value of the said Martha
(10) Kane's interest in said plantation near Raleigh, according to the terms of the aforesaid power of attorney.

This affiant further says, that the said John Kane, died, about May of the year 1863, and after his death, as this affiant has been informed and believes, it was supposed for a time, that he left no heirs-at-law who could inherit his real estate in North Carolina, and the same was taken into the possession of the Trustees of the University of North Carolina as having escheated, and the said public corporation received the rents and profits of said real estate, for three or four years, and is liable to account to the said Martha Kane for one-half the value of said rents, &c., for the said three or four years. The value of this claim, which is admitted, has never been ascertained, the said corporation not yet having been in a condition to discharge the same, but this affiant insists that in any settlement he may have with the said Thomas and Martha Kane, he is entitled to a credit of one-fourth of the value of said claims according to the terms of his aforesaid power of attorney.

This affiant further says, that he has been informed and believes, that the said John Kane, was at the time of his decease, possessed of a very considerable personal property,

consisting of slaves, household and kitchen furniture, bar fixtures, and the necessary furniture for carrying on an eating-house, some old family plate, farming utensils, gold and silver coin, which he had stored away before and during the first part of the late civil war, and bonds, notes, accounts due him. That the same, upon his decease, went into the possession and under the control of his administrator, to-wit: Patrick Donnaghey and John Whitelaw, and that they have eloigned and wasted the same; that after extended search, this affiant has failed to find the administration bond, filed by said administrators, in the Court of Pleas and Quarter sessions of Wake county—many of the papers in the office of the Clerk of Wake county Court having been misplaced and destroyed, about the time when the city of Ral-
(11) eigh was occupied by the U. S. army, in the Spring of 1865. That the minutes of Wake County Court were so ill kept in 1863, and the entry therein of the names of the sureties on the said administration bond, is so much defaced and so imperfect, that this affiant has not been willing to rely upon it to bring a suit upon said bond, to receive the distributive share of the said Martha Kane, as one of the next of kin of John Kane, deceased. That moreover, there are several claimants who assert that they are creditors of said John Kane, to large amounts, and were residents beyond the Confederate lines at the time of John's decease, and have therefore remained unpaid, and it has been understood between this affiant and several members of the Bar, rdsident in Raleigh, who hold said alleged claims for collection, that a suit or suits should be instituted by them to ascertain whether said claims could be established and collected without subjecting any funds or real estate, which this affiant held as the agent of the said Martha Kane, to their payment; in consequence of all these circumstances and others of less moment, this affiant has heretofore failed to ascertain the distributive share of Martha Kane, in the assets of John Kane, deceased, and to collect the same, but he believes the value of said distributive share is very considerable, and he has great hope that it may be eventually reduced to possession. This affiant has carefully examined into the whole matter, and while he cannot state the probable value of said interest and claim, he insists he is entitled to a credit of one-fourth of said value, in any general and final settlement he

may have with said Thomas and Martha Kane, under and by virtue of his power of attorney aforesaid.

This affiant further says, that when he took the said power of attorney from the said Thomas and Martha Kane, as is herein set forth, the one-fourth part of the funds, property and estate, which it is therein provided, this affiant is to retain for his own use, was regarded and considered by the parties to said instrument, as his compensation for his general
(12) agency and management in their affairs in the matters therein set forth. And it was expressly understood and agreed if suits arose in the conduct of their business, this affiant was to be at liberty to pay counsellor's and attorney's fees in said suits, with the funds of the said Thomas and Martha Kane—accordingly when this affiant found it necessary to bring the action hereinbefore referred to, and which was ultimately decided in the Supreme Court, he concluded to conduct such suit himself, he being very familiar with the facts of the case, and avoid the expense of sub-counsel, and when he wrote the result of said trial, to the said Thomas and Martha, after the decision of the Supreme Court therein was known, the said Thomas wrote to this affiant in reply, expressly agreeing that the amount of his remuneration for legal services was not to be limited by the one fourth specified in the power of attorney, and this affiant hath herewith filed the said letter of the said Thomas, bearing date May 22d, 1869, and he insists that the amount of said additional compensation, must be ascertained and allowed in the settlement with the said Thomas and Martha Kane.

This affiant further says, that from the time when he first began to act as the general agent of the said Thomas and Martha Kane, under his aforesaid power of attorney, it was understood and agreed, by and between himself and the said Thomas and Martha, that he was to retain a considerable portion of their funds in his hands, until all matters connected with his said agency were completed, and from time to time as they needed it, they were to draw upon him for money, and that no final settlement was to be had between them, until the end of his said agency; while suits were existing or imminent or impending, it was considered necessary for the full and effectual performance of his duties as their agent and attorney, in fact, that he should have money of theirs in his hands, and this affiant insists that upon a fair

and just settlement of accounts between him and the said Thomas and Martha, taking into consideration the
(13) various matters hereinbefore set out, and the agreements and understandings aforesaid a very small balance, if any, would be found in favor of the said Thomas and Martha, over and above his own outstanding acceptances for $1,000 each, hereinbefore more particularly described.

This affiant further says, that it is not true as stated in the affidavit of Martha Kane, upon which the rule against him herein is based, that has repeatedly promised to account with the said Martha Kane for his receipts under said power of attorney and therein disappointed her; that on the contrary no demand has ever been made upon him for an account and settlement by the said Thomas and Martha Kane, or either of them, except as is hereinafter set forth. That this affiant had never heard any complaint from the said Martha and Thomas, or either of them, on account of his manner of managing their affairs or for his want of promptness in forwarding their money, until after his failure to meet the two drafts of $1,000 each, hereinbefore more particularly described, when he received a letter from the said Martha, then in Brooklyn, asking him to make arrangement, and pay said drafts—which letter, bearing date November 8th, 1871, he herewith files—as well as another letter from her, bearing date October 16th, 1871.

The next information he had of the said Martha, was about the 27th of November, 1871, when he learned from a member of his family that she had arrived on the Northern train, driven at once in the omnibus from the cars, to his residence, and left word for this affiant that she was in Raleigh and desired to see him. This affiant was not at home when she called as aforesaid, about dark in the evening. The Circuit Court of the United States was then in session in this city, upon which it was absolutely necessary for this affiant to be in attendance, both at its morning and afternoon sessions, in the performance of his professional duties, but as soon as he learned she was in Raleigh, he inquired of the omnibus dri-
ver that very night where she was stopping, and sent a
(14) message to her early the next morning, making an appointment with her at his office, that very day, for about the hour of adjournment of the Circuit Court in the forenoon, between 1 and 2 o'clock, P. M., at which time he met the said Martha, in accordance with said appointment.

In this interview the said Martha stated to this affiant that her object in visiting Raleigh was to make arrangements for the payment of one of said acceptances for $1,000. She stated the difficulties of her position substantially, as set forth in her letters and affidavit. She did not call upon this affiant for a general account and settlement; on the contrary, she stated that she did not desire any such account and settlement until all her business under the said power of attorney was finished, when a general one could be had, and in the meantime, that this affiant was at liberty to continue to use her funds. She further stated, she only desired this affiant to make arrangements to protect her said drafts of $1,000 each, and if not both of them, then the payment of one was all that she desired—that all other matters were to remain over until the business was concluded and for a general settlement at this affiant's convenience when his agency was terminated. In this interview the said Martha did not even ask this affiant to give her a general idea of the balance in his hands in her favor, or to let her know the general condition and state of accounts between them.

This affiant stated to her, that when he accepted her drafts he expected to meet them promptly, but that he had been disappointed in the receipt of money that he expected to receive in time; that he even yet hoped for the arrival of funds within the next eight or ten days, (as was the fact), and if he was fortunate enough to get them he would pay one or both of said drafts. He stated to the said Martha, that during the time her funds were in his hands, and when he was receiving the same from time to time, he had lost large sums of money by the default of himself, or of others, amounting in the aggregate to $25,000 or thereabouts; that he was (15) greatly pressed himself and embarrassed in his pecuniary affairs; that he had not under his control in cash even so small a sum as $20 to provide for the daily wants of his large family, but he would do his very uttermost to relieve her from her embarrassing position, and this affiant avers that all his statements made to the said Martha as aforesaid, were true, and he has strained every nerve to raise money for her, as was indeed his duty under the circumstances, but he has hitherto failed of any success in his endeavors.

This affiant told the said Martha, that it would have been better for her to have warned him beforehand, by letter, of

her coming to America to collect money from him, so that he might have had some opportunity to prepare for her. Whereupon she stated that the collection of money from this affiant was not the purpose or object of her visit to America. That she had come over to this country for the purpose of seeing a sick relative in Newark, N. J., whom she had learned was likely to die, and while here had concluded to draw the aforesaid drafts on this affiant.

This affiant assured her he would do his best in her behalf, whether she was here, in Newark, or in Ireland; that as she had stated to him, she was at heavy expenses in boarding, perhaps it would be better for her to return to her friends in Newark—that if this interview were prolonged for hours, or repeated daily for twenty times, he had dealt with her frankly, and could say, do and promise no more than he had already done. But she expressed a desire to wait in Raleigh eight or ten days, to ascertain what this affiant could do for her in the premises, at the end of which time she would again call upon him. This affiant stated to her that the United States Circuit Court was in session, he was obliged to be in attendance there daily, but if, she desired to meet him at any time, she had only to send a message to his house to that effect, and he would always manage to fix some time in the recess, for that purpose.

(16) On parting, the said Martha asked this affiant to furnish her with a note to her landlord, Marx Schloss, stating he would be responsible for her board, which this affiant promised to do, and accordingly during that evening this affiant wrote such a note and sent it to the said Martha early next morning, wherein he informed said Schloss that he, this affiant, was the agent of the said Martha, had funds of hers in his hands, and would promptly honor any drafts the said Martha might draw upon him in favor of the said Schloss, for the amount of her board bills. This affiant further says, that the said Martha Kane gave him no previous warning of her intended trip to America, nor of her coming to Raleigh from Brooklyn or Newark, on account of the non-payment of the aforesaid draft, and since the interview last herein before described, in which this affiant was polite, deferential, kind and respectful to her, expressing the deepest sympathy for her circumstances, and the most profound regret for his inability to meet said drafts at maturity, all of

which he felt, he has never seen her, nor had any communication from her, except as hereinafter set forth.

Within a day or two after said interview, early in the day, while this affiant was in his bed-room, undressed, and while he was hurrying his dressing and breakfast, in order that he might get in time to the Circuit Court, which was still in session—a member of his family knocked at his door, and informed him Mrs. Kane had sent word from his office that she was there to see him. It was then after the usual Court hour, and this affiant being greatly hurried, and not being completely clad, was compelled to send her word that he could not see her then, but if she wanted to see him specially, to send or leave word at his house during the day, and he would inform her of an hour when he could see her at his office. This affiant heard no more from her, nor of any further efforts on her part to see him, and he had supposed she had left the city, until he learned to the contrary,
(17) after the rule in this matter was served upon him, late in the afternoon of the 3rd of January, 1872

This affiant, therefore, says, it is not true as stated in the said Martha's affidavit, that he promised in the aforesaid interview with her, to pay her the balance of the $10,000 claimed by her, less $2,600, within ten days from that interview, nor is it true, as stated in said affidavit, "That even after said last mentioned interview, this affiant has refused to see or communicate with her, the said Martha, or to pay her any part of the money so in his hands for her, or to give her any satisfaction as to his purpose to settle with her and pay her."

This affiant further says, that on or about the 9th day of December, 1871, he received through the post office, the letter which is herewith filed, bearing date December 7th, 1871, and signed by Messrs. B. F. Moore, and Phillips & Merrimon, wherein the said gentlemen, as counsel for Mrs. Martha Kane, ask this affiant to favor them with an account of her affairs in his hands. This letter reached the affiant during the aforesaid session of the United States Circuit Court, when this affiant was daily occupied with his professional duties in said Court. He knew that a written statement, which would do justice to this affiant, would be laborious and voluminous, and would require considerable search among his letters, papers and accounts, and it was impossible for this affiant to give his attention to the matter during the term of the said Court; accordingly this affiant, within a day or two after said

letter was read, saw Judge Merrimon in Court, and stated as much to him, and promised to give him an answer to his letter, and request as soon as he was less pressed by business and attendance on Court, and this affiant understood Judge Merrimon to express his satisfaction with that arrangement.

The said term of the Circuit Court adjourned a day or two before Christmas—this affiant, was and continued, very unwell during Christmas week, and was entirely unfit for business in his office. On the 2d day of January, 1872, a
(18) special term of the Superior Court of Wake county, convened in Raleigh, and has been in session ever since, and this affiant has been compelled to give his time and attention to attendance on said Court, and performance of his professional duties connected therewith, and he only makes time now to reply to this rule by neglecting his duties to his clients in the said Superior Court of Wake county.

This affiant was therefore surprised, when, without further communication from the said Martha Kane, or any of her counsel, the rule in this matter was served upon him on the 3rd of January, 1872, at dark, while this affiant was within the bar of the Superior Court of Wake county, and actually engaged in arguing an important matter then pending before said Court.

And this affiant most solemnly avers, that he hath not now in his possession any funds belonging to the said Thomas and Martha Kane, or either of them, nor has he in his possession, or under his control, any property or estate, in which he has invested the same, or any part thereof; nor has he invested any of their, or either of their funds for his own use or benefit; nor has he ever purposely, or knowingly, or wilfully, or corruptly appropriated to his own use or benefit, any portion of the moneys which came into his hands by virtue of his aforesaid power of attorney.

This affiant admits, that he ought to have funds of the said Thomas and Martha in his hands to meet the aforesaid drafts for $2,000, which he has accepted; and also to pay the balance, if any, which your Honors shall declare to be due them upon the statement of the general accounts of debts and credits, between this affiant and the said Thomas and Martha, on account of his agency under his aforesaid power of attorney. But he avers that his failure to have said funds in hands, results partly from the frauds and mismanagement of other persons against which he could not guard, and partly from

his own want of that care and diligence, which he
(19) ought to have exercised, whereby he has lost and been deprived of said funds, and not at all from any corrupt misappropriations by him in his professional character, and as an officer of this Court, of the moneys which came into his hands for the said Thomas and Martha.

This affiant admits that he owes the said Thomas and Martha a debt that the debt is one against which he has most probably no legal defence; that it is one which every instinct of his professional honor prompts him to pay, and against which he would not even attempt a defence; but this affiant avers, that by a series of misfortunes, and a want of proper management, and care, and prudence in the conduct of his affairs, he has become utterly destitute; that he has not ready money in hand sufficient to pay for daily food for his wife and children; that all his visible property has been seized and sold under executions; that his law library has been sold for taxes; that he has nothing in his possession, but the clothing and wearing apparel of himself and family and a small supply of fuel, and no hope of a preservation from starvation, for himself and his wife and children except in the fees which he may hereafter derive from the exercise of his profession; and he has exercised and exhausted all his credit, tact, ingenuity, influence and skill in his efforts to raise funds to meet the aforesaid drafts for $2,000—in vain. If your Honors should order him to pay any sum of money into the Court for the use of said Martha, this affiant's compliance with said order, would be a moral and physical impossibility; and this affiant denies that his indebtedness to the said Martha originated in such circumstances of official misconduct and corrupt and criminal practice on his part as authorized proceedings against him, as for a contempt, summarily to compel him to pay such debt to said Martha Kane by process of contempt.

This affiant will endeavor as succinctly as he can, and if he have sufficient time before he is ruled, to answer the rule served upon him herein, to state in detail, the combination
of circumstances which has placed him in his present
(20) painful position, and rendered him unable to pay to the said Martha any balance of her funds, which your Honors may declare him liable for, and which ought to be in his hands.

At the close of the late war, in 1865, this affiant was en-

tirely destitute of means, and owed a large amount of money to numerous individuals. He exerted all his power to make money to free himself from debt, and was eminently successful. He commenced discharging his debts rapidly; but in carrying out his plan of paying all as he could, he found himself annoyed, and hindered by the fact, that *in some way it became known* whenever he made a deposit of any considerable amount with his bankers in Raleigh, and his creditors, who gained such information became importunate. He therefore resolved to close his bank account, which he did, according to his best recollection, in the latter part of 1867, and kept such money as he acquired from time to time, and such as came into his hands for others in his own possession, about his own person and in his own house and office, in one common fund, which, for some months, did not amount at any one time, to any very large sum. Towards the Fall of 1869, this affiant had paid off all his pressing back debts, and had commenced to accumulate considerable sum of his own, being in large practice, had in his hands several thousand dollars belonging to his clients, among other moneys, he had some $2,000 or $3,000 of the Kane fund in hand, he cannot say with absolute certainty how much.

Before the war, this affiant had been in the habit of keeping a deposit account for some nine years in New York City, in the banks of New York, principally because by means of checks, on such account, he was enabled to more conveniently transmit, collected money, to his clients. About August and September, 1869, he determined to open a similar account with a banking house of reputation in New York City, and for a similar purpose. This affiant was then in the possession of a large amount of cash of his own, and some belonging to others. His professional income
(21) in cash alone for the months of July, August and September, 1869, reached about $8,750

This affiant made arrangements by which, at about this period, he placed near $10,000 to his credit in New York, and on this fund he relied to pay his then indebtedness to Mrs. Martha Kane and others, it being much more than sufficient for that purpose. He had about the same amount, even more, in ready money or drafts, equal to cash, in his hands in North Carolina. Under such circumstances he did not take any special plans to keep each separate fund in his hands

distinct. He had much more than sufficient, on hand, to pay all when called upon.

Between the middle of September and the end of October, 1869, this affiant learned certainly, that his banker in New York had failed, and his $10,000 fund in that city, had ceased to be available for the purposes for which he had originated it.

About this time, this affiant got in hand some $13,000 more of his own money. At a former period of his life, this affiant had been addicted to intemperance in the use of ardent spirits. Under the shock which this heavy loss gave him after his hard struggle for many years, to free himself from debt, this affiant again fell into habits of hard drinking—he was rarely and only for short intervals, free from excessive intoxication; from the end of September, 1869, until the Summer of the year last past. He had this large sum money in his hands, he received other large sums belonging to himself and others, during this period, especially about Febrbary, 1870; he had some $1,600 of the Kane funds, received in January of said year, and about $3,700 more, received in February of the same year. This affiant, for several months, about this time, was in a state of mad drunkenness. He had large sums of money about his person, his office and his house. He has never been able to ascertain what became of the large sums of money then in his hands; he is ignorant what he did with them, he is sure he was robbed of large sums; he was defrauded of some; he must, in his (22) drunken ignorance, have squandered some; he may have lost some; sometimes, when he would, to some extent, recover his reason, he could not but believe that in his hours of entire loss of recollection, he must have hidden his money away, and forgotten where he had put it, so entirely unable is he to account for his heavy deficit. This affiant's own income, and other services were, during this period, more than sufficient for his own wants and expenditures, and so far as his knowledge extends, he did never intentionally appropriate any of Mrs. Martha Kane's funds to his own use and purposes. After this affiant's loss of his deposits in New York, and during the period when he was receiving Mrs. Kane's funds, he had in hand in cash of his own, more than $25,000. The result of the whole matter has been, that he has lost large sums of his own, and has become indebted to Mrs. Martha Kane and is unable to pay her.

This affiant further says, that under the advice of his counsel, he has endeavored to answer fully and explicitly the rule herein, and to make the fullest and frankest disclosure of the whole matter involved therein to the Court. That his answer has necessarily been prepared in great haste, and under adverse circumstances; this Court has ruled him to a prompt reply, and this, during a time when this affiant was daily occupied in another Court, and has so been compelled to prepare his answer during the night hours for the most part, and when he was much exhausted by other labor, that he has been hurried in the examination of his papers, and has been in much mental distress during its preparation, so that it is possible he may have made some slips of memory in slight detail, but this affiant does not think he has, and he believes the whole of this affidavit and every detail thereof to be true.

ED. GRAHAM HAYWOOD.

Sworn, &c.

(23) The matter was then discussed by Messrs. B. F. Moore and Phillips in opposition to, and by Messrs. Fowle and Batchelor in support of the sufficiency of the answer. [The briefs on file are inserted *infra*.]

The Court, after consideration, adjudged the return insufficient, and on motion, an order was made requiring Col. Haywood to show cause on the 29th day of January, 1872, why he should not be attached for contempt of the Court, by reason of his default in failing to pay in the money.

On the return day Col. Haywood filed an answer admitting that he had failed to pay in the money, averring his great anxiety to comply with the order, disclaiming any wilful disobedience thereto, setting forth substantially, that he had made every effort to comply; that he is entirely insolvent without credit, &c.

On argument of this answer, it was suggested that Col. Haywood had, by his conduct, rendered himself subject to be disrobed, and the matter was left open and another rule granted in the matter of Ed. Graham Haywood, *ex parte*, requiring him to show cause on the 3d day of February, why he should not be attached "or otherwise dealt with" for contempt, in failing to pay in the money, at which time Col. Haywood filed an answer, setting forth in substance that he is ignorant of what acts of his, touching the money transaction, are alleged to

constitute a contempt of the Court; that he is advised that none of his acts, touching the money, amount to such misbehavior by him in an official transaction as constitutes a contempt of the Court; disclaimed intentional disrepect of the Court, or disregard of its authority, &c., and refers to and adopts his two former answers. Thereupon, the two cases above stated were argued again by the same counsel who argued the first return.

Mr. Moore filed the following brief:

In the matter of E G. Haywood, Esq., I will conclude my opinion upon the questions propounded by the Court to me as an attorney of the Court.

Having at the outset of the case doubted whether the (24) office of attorney was a public office, I could not, so long as the doubt existed, satisfy myself that a mere misbehavior in the office was indictable.

During the continuance of the matter I have found authorities which satisfy me that the office is a public one.

Walmesly v. *Booth*, Barn.. Ch. Rep., 478.

Waten v *Whittemore*, 22 Barb., 590.

Merret v. *Lambert*, 10 Paige, 356.

Wallis v. *Loubat*, 2 Denio, 607.

Hurst's case, 1 Th. Raym., 94, 1 Lev., 75.

If such be its charater, misbehavior therein is indictable, both at common law and statute. Bac. Abr., Offices N.

Rev. Code, ch. 34, sec. 119.

Contempt of Court is a *criminal offence*. Hawkins, B. 2, ch. 22.

The Supreme Court of the State has full and complete jurisdiction to try and punish all matters of contempt offered to itself either in *facie curiæ*, or in the misbehavior of its officers.

The power, so to punish every kind of contempt recognized by the law, has ever been exercised in this State, notwithstanding sections 8 and 9 of the "Declarations of Rights" of the late, and sections 12 and 13, Art. 1, of the present Constitution.

Ex parte Summers, 5 Ired., 149.

State v. *Woodfin*,, 5 Ired., 199.

State v. *Yancey*, 1 Car. L. Rep., 519.

The same powers have been exercised by the Courts of the United States, notwithstanding Art 2, sec 2 and 3 of the Constitution of the United States. Peck's trial, *passim*. *U. States* v. *Hudson*, 7 Cr. 32.

The broad power formerly belonging to both Courts has been curtailed by statute.

But as to those contempts, not affected by statute, the
(25) power to declare the contempt, as completely exists now, as it ever did. *Ex parte Poulson*, 15 Haz. Pa. Reg., 380; *U. States* v. *Hudson, ante; U. States* v. *New Bedford Bridge*, 1 W. and Minot, 401; 1 Br. Dig. Fed. Decisions, 167, pl. 19; *Pittman's case*, 1 Curt., 186.

Legislation has affected only the *number* and *character* of acts, which constitute contempts, and their *punishment*.

Resignation of an officer, even, does not oust the jurisdiction to proceed against him for a contempt committed in office. 1 Ab., 508, Cir. Co.; 1 Brightley, 167, *ut ante*, pl. 20.

Contempt of Court being a *criminal* offence, the Supreme Court has complete jurisdiction to try and punish the offence, whether offered to itself in the face of the Court, or in the misbehavior of its officer in the discharge of his duties. Whenever, therefore, a case of contempt to the Supreme Court is tried by the Supreme Court, and in the trial the party confesses the criminal offence charged; and the acts constituting the contempt are of such a character as show the guilty person unfit to be trusted in the discharge of his profession as an attorney, then the case falls expressly within the words of the Act of 1870–'71, ch. 214, sec. 4. The confession must be voluntary and made in a criminal trial. Why should the confession, before a jury court on an *indictment* for misbehavior, have greater weight than a confession on an attachment and trial by a competent court for the same offence?

In my opinion, these requisites only, are necessary to bring a case within the statute:

1. The offence tried must be a criminal offence.
2. The Court trying it must have jurisdiction to try it.
3. The confession of the criminal offence must be made on the trial of it before the Court thus having jurisdiction.
4. Any Court, therefore, having competent jurisdiction to try the criminal offence, is competent to take the open confession, and when made must necessarily have the same
(26) effect as if made in a Court where the trial of criminal offences is by jury.

In England *disbarring* an attorney is rare, and is not exercised as a mere *punishment* of the attorney. *In re Brownsall Comp.*, 829, 1 Ch. Cr. Law, 660; 1 Tidd, 89; *Ex parte Stokes*,

18 E. C. L., Rep., 303 and notes, (Ed. 1856); *In re Wallace*, 1 Pr. Coun. Case, 283.

Jurisdiction of the Courts over contempts for official misbehavior is very efficient, and usually accomplishes all that is needed to secure the observance of the duties, and preserve the dignity and honor of the bar. The jurisdiction of the Courts of this State over contempts, styled those of official misbehavior, is unrestrained, except as to the amonnt of fine and duration of imprisonment.

It is the high duty of every Court to protect public justice against criminal acts of contempt. If the act done deserves punishment, it lies in the discretion of the Court alone to allow proceedings for that purpose. This the Court, as ministers of justice, should always institute, whenever, from the case developed, the Court shall conclude that the interests of the public require the infliction of punishment for the misdeed. Anon., 22; Wend., 656.

If the Court deline to take action, it must be because punishment would be of avail either to reform, or warn by example.

In presenting my views, at the suggestion of the Court, upon these matters of law, I do not feel myself at liberty to indicate any opinion affecting the discretion of the Court as to its action; what the Court may or should do rests exclusively with it..

Phillips & Merrimon filed the following brief:

I. Misbehavior of attorneys is specifically *a contempt. Comyn*, "Attorney," B, 13. Such conduct creates "*disgust* against the Courts themselves," is Blackstone's lan-
(27) guage, IV., 284.

II. A contempt is *a criminal offence.* Many authorities may be cited. We refer to 2 Privy Council, 106, *Pollard's case*, decided by Erle, Wood. Selwyn, Colville, and E. V. Williams. This decision turns upon contempt, being "a criminal offence."

III. Where a Court adjudges a contempt, it *convicts* there of; *Yates' case*, in 6 and 9 Johns. "Convict" could have no more solemn meaning than in the connection in which it occurred there. See also *Coulson* v. *Graham*, 2 Chitty's Rep., 57.

IV. If the Court decide that the respondent here has been

guilty of misbehavior in his official transactions, rendering him untrustworthy, etc.; then, *to reduce this to technical language*—they have "convicted him of a criminal offence, showing him unfit to be trusted in the discharge of the duties of his profession." (See Act of 1870–'71, chap. 216, sec. 4.)

Fowle & Batchelor, for respondent.

PEARSON, C. J. Mrs. Kane invoked the power of the Court, as one of its suitors, to compel by process of attachment, E. G. Haywood, Esq., one of the attorneys of the Court to pay to her a large sum of money, to-wit: $4,496, ascertained by clerk's report, which he had received as her attorney of record, and on demand failed to pay.

A rule was therefore made, that said Haywood show cause, &c. To this he put in a long and detailed answer, admitting that he had received the money and failed to pay it to Mrs. Kaine, but denying that he had applied it to his own use, and averring that the money had been lost; in what way he was unable to say, for he had been "mad drunk" during a period of eighteen months, and supposes that he burnt up the money by throwing it into the fire, or he may have
(28) put it away in some secret place to keep himself from destroying it, and never has been able to find it.

This answer was deemed insufficient, and the respondent was put under a rule to pay the money into court, or show cause why he should not be arrested. To this he answered that after making every effort to comply with the rule, it was out of his power to do so, he was totally insolvent, had nothing to support himself and his wife and children, could get no aid from his friends and relations, and had no credit. That in failing to perform the order he intended no contempt of the Court and deeply regretted his inability to do justice to his client.

This answer was held by the Court to be sufficient. The respondent was not arrested and imprisoned, because the Court was satisfied, that it was not in his power to pay the money into Court. If a party is ordered to execute a deed and refuses to do it, he will be kept in jail until he executes the deed; for that is a thing which he can do. So, if an attorney, by false representations, procures his client for an inadequate consideration, to assign the cause of action, he will be put in jail and kept there until he executes a release and

a re-assignment, but when a man is ordered to pay money into Court, and swears, that after every effort, it is out of his power to pay the money or any part of it, (in the absence of any suggestion to the contrary) that is an end of the proceeding, for the Court will not require an impossibility, or imprison a man perpetually for a debt, he having purged himself of the contempt.

After this rule was discharged, another rule was applied for by some of the members of the bar—that "E. G. Haywood be attached and further dealt with according to law." for matter set out in the prior proceedings: the rule was granted, and the matter has been fully discussed.

On the opening of the argument "In the matter of E. G. Haywood, *ex parte*," the attorneys when requested by the Court, to state what further proceeding, was asked for, (29) demanded, "that said E. G. Haywood be disbarred and deprived of his license to practice as an attorney of the Courts in this State." We have been aided by full and able argument on both sides of the question. But for the Act ratified 4th April, 1871, we should feel it our duty to disbar E. G, Haywood, and strike his name from the roll of attorneys at law.

So, the matter turns upon the construction and true meaning of the Act of 1871; sec. 4, is in these words: "no person who shall have been duly licensed to practice law as an attorney, shall be disbarred or deprived of his license and right so to practice law, either permanently or temporarily; unless he shall have been convicted or in open Court confessed himself guilty of some criminal offence, showing him to be unfit to be trusted in the discharge of the duties of his profession."

The words "convicted or in open Court confessed himself guilty of some criminal offence," have acquired a technical meaning, to convey the idea that the party has been convicted by a jury, or has in open Court, when charged upon an indictment, declined to take issue, by the plea "not guilty," and confessed himself guilty, and at the mercy of the Court. This is obvious by the sense in which these words are used in the section under consideration. The tenor of the whole act shows, that such was its purpose. The preamble sets out, that doubts have been expressed as to the construction of the Act of 1869, by reason of which the Judicial authority have asserted, that other acts of contempt, not spe-

cified in said act, still exist at the common law, and the Courts "have assumed to exercise jurisdiction over the same, and to *impose* other *punishments therefor*" (to-wit, disbarring or striking from the roll).

The statute, then goes on with a manifest intention to restrict the power of the Judiciary, just as far as the Constitution permits the General Assembly to do, and confines the neglects and omissions of duty, malfeasance, &c., &c., to the specified particulars in the Act of 1869, and for fear of
(30) evasion by the Courts, it is enacted, "if there be any parts of the common law now in force in this State, which recognize other acts, neglects, malfeasances, &c., &c., the same are hereby repealed and annulled.

Then comes section 4, by which it is enacted not that the attorney may be disbarred, if he be convicted of a contempt or if he confesses himself guilty in open Court, supposing a trial by the Court for a contempt, but "unless he *shall have been* convicted, or (shall have) confessed himself guilty in open Court of a criminal offence, using words in the past tense, and assuming a conviction to have been had by the verdict of a jury, or by confession in open Court when charged upon a bill of indictment. The purpose of the statute is so plain, that "he who runs may read."

Mr. Phillips argued that the word "convicted" is sometimes used in the sense of a conviction by the Court, and cited *Yates' case*, 6 Johnson, 338, and *Yates* v. *Lansing*, 9 Johnson, 396, in which the word "conviction" is used in that sense. But note, there the matter is spoken of as a conviction by the Court of *a contempt*, here it refers to a conviction of some *criminal offence*, which can only be by the verdict of a jury or by confession, and note further, that if the section under consideration, means a conviction by the Court for a contempt, as was the course before, the statute effects no change in the law, and makes a great parade for no purpose.

Mr. Moore on the argument, gave it, as his opinion, that an attorney was guilty of a criminal offence as a misdemeanor, for "misbehaviour in any official transaction," and took the position that the respondent could be dealt with as one "who had confessed himself guilty of a criminal offence."

The same reasoning is applicable to this position, as we have used in reference to one who shall have been *convicted* of a criminal offence, with this additional consideration—the confession in this instance was not voluntary as when one

charged upon a bill of indictment confesses his guilt
(31) in open Court; but the respondent was forced to it;
had he refused to answer on oath, he must have been imprisoned until he did so. Under these circumstances, to use his confessions as establishing guilt, would be in effect to compel him to criminate himself on oath.

For this kind of inquisitorial proceeding, there is no precedent in the Courts of any country, which enjoys the rights guaranteed by "*magna charta.*"

We declare our opinion to be, that the Act of 1871 takes from this Court its common law power, and that the Court now has no power to disbar an attorney, unless he shall have been convicted, (by a jury) or (shall have) in open Court confessed himself guilty of some criminal charge, showing him unfit to be trusted in the discharge of the duties of his profession.

The constitutionality of this statute, *with certain savings in respect to the inherent rights of the* Court, is settled by *ex parte Schenck*, 65 N. C., 253. This is not a direct contempt, within the savings made by that decision, but a constructive contempt, made so, by the common law to enable the Court to purge the bar of unworthy members. That common law right is taken away and the power of the Court is restricted to particular circumstances, after a conviction or confession upon indictment. We have no disposition to exceed the limits prescribed by that statute: the proceedings will be suspended, to the end that, this Court may take further action should it become necessary; however painful the duty may be, to order the name of one of its attorneys to be stricken from the roll, the Court will perform it, should the case be brought within the meaning of the statute, in such cases made and provided.

Its exercise was not asked for, but it was said on the argument, the Court had the power to punish the respondent, by fine and imprisonment, under section 2 of the Act of 1869, for misbehaviour, as an attorney in an official transaction, under paragraph 8, section 1.

If it was clear, that the Court had the power to punish by
fine and imprisonment for the mere sake of punish-
(32) ment, a *constructive consequential contempt* like that
under consideration; it might be questioned, whether this Court, which was not created for the punishment of criminal offences, should, on mere motion, inflict the punishment,

after the proceeding to disbar has been suspended, to await further preliminary steps, should any be had, in the Superior Court. There is no doubt that a party may be doubly dealt with, and sometimes trebly; for instance, if an attorney commits murder in the presence of the Court, he may instantly be fined and imprisoned for this direct contempt, he may be indicted, convicted and executed, and before execution his name may be struck from the roll, after the manner of the age of chivalry, when the spurs of a Knight attainted, were struck off before execution, to the end that the order might not be put under disrepute, by his suffering a disgraceful death while he was a Knight. But ours is a different case. The respondent as an attorney of the Court, received the money, is not able to account for it, and fails to pay it over to his client, but as there is no proof or admission that he wilfully and corruptly applied it to his own use, it is a clear case for disbaring at the common law, but if he is punished by imprisonment, at the end of thirty days he comes out of jail, and walks into Court entitled to all of the rights and privileges of one of its officers

The question as to the power of the Court is not free from difficulty. If a man refuses to execute a deed when he is ordered to do so, imprisonment is a fit and proper remedy, so if a man insults a Judge which on the bench, such punishment is fit and proper; but where there is a moral delinquency showing an attorney to be an unworthy member of the bar, then imprisonment is not an appropriate remedy for the evil

In ex parte Moore 63 *N. C.*, 397, and *ex parte Biggs* 64 *N. C.*, 202, we had occasion to examine this subject fully, and our conclusion was, that as fine and imprisonment did not furnish a fit and proper remedy for the case of an attorney who by reason of moral delinquency or for other cause,
(33) had shown himself to be an unworthy member of the profession, such cases were not provided for by the Act of 1869, nor that the common law power of the Court, could still be exerted.

The Act of 1871 takes from the Court this common law power to purge the bar of unfit members; except in specified cases, and it fails to provide any other power to be used in its place, it is a disabling and not an enabling statute; the whole purpose seeming to be, to tie the hands of the Court, so, when, our power is taken away the Court is not at liberty

to fall back upon another which it had before adjudged to be ineffectual to accomplish the end proposed; indeed the Court could not do so on mere motion, with a proper regard to its self-respect, and without evincing what might be justly considered, a pertinacious purpose, to press *the matter* of *contempt*, and if not allowed to do it in one way, to do it in another, however unfit the latter may be, to effect its purpose of preserving the purity of the legal profession.

PER CURIAM.—Let the proceeding in the matter of E. G. Haywood be suspended.

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(34) J K. & M. H. PINNIX *v.* THE CHARLOTTE AND SOUTH CAROLINA RAILROAD COMPANY.

1. When goods are shipped to a consignee over a railway, the shipper cannot, by notice to the carrier compel him to stop the goods at an intermediate point.
2. Whether an agent of such carrier may not bind his principal by an express contract to hold the goods *quere*, but such contract must at least be an express one.
3. Where tobacco was shipped from Thomasville *via* Charlotte and consigned to a party in Columbia and was sent off from Charlotte, by rail to Columbia, according to the bill of lading, and the tobacco was received by the consignee in Columbia, but no express contract to hold at Charlotte was shown, the measure of the shipper's damages is the cost to send it back, or what it would have cost to send it back, and compensation for the delay.
4. The receipt of the tobacco by the consignee and having it stored, was not a waiver of the liability of the defendant, for sending it without orders, for the plaintiffs were not obliged to give up their tobacco by refusing to receive at Columbia, and charge the whole value to the defendant, nor were they obliged to send it back and charge the defendant with the expense and delay; they had their election to receive the tobacco, keep it in Columbia and charge the defendant, with what it would have cost, to put the tobacco back in the place from which it was wrongfully sent.
5. The shipment of tobacco from Charlotte to Columbia on the 4th day of February, 1865, cannot be deemed, the proximate cause of its loss, by the burning of Columbia by Gen. Sherman, on the 17th of the same month.

The case *Bell* v. *Bowen*, 1 *Jones*, 316, cited and distinguished.

This was an action on the case commenced under the former system and tried at Fall Term, 1871, of Rowan Superior Court, before His Honor Judge Cannon and a jury.

The action was brought to recover damages for the loss to plaintiffs of a large quantity of manufactured tobacco, al-

leged to have been lost, in consequence of the neglect of the defendant to obey the plaintiff's instructions to stop
(35) the same while in transit. It was in evidence that the tobacco was shipped at Thomasville, on the N. C. R. R., and consigned to one Solomon, in Columbia; that at Charlotte it had to be re-shipped on the road of the defendant, one of whose *termini* was Charlotte.

That one of the plaintiff's went to Charlotte and reached there before the tobacco was put in charge of the defendant.

That the defendant's agent, at his request, expressly agreed to hold the tobacco for a few days, but that the same was forwarded in violation of this promise; that on learning this the plaintiffs made application to the President of the defendant to re-ship the tobacco from Columbia, which he declined to do.

It was also in evidence that the tobacco was started from Charlotte about the 4th of February, 1865, and that Columbia was destroyed by fire, by Gen. Sherman's army, on the 17th of the same month, and the tobacco was consumed in the conflagration.

There was also evidence tending to show the price of such tobacco, at the date of its loss in Charlotte, in Salisbury, about 40 miles distant, and at Columbia, 110 miles from Charlotte.

There was much evidence offered by defendant tending to contradict and rebut the force of the plaintiff's testimony, but it is deemed unimportant to state it, to a proper understanding of the case.

His Honor was requested by the plaintiff, in writing, to give the jury the following instructions, viz.:

1. That if the jury find from the evidence that plaintiff, before defendant received the tobacco, instructed the defendant's agent at the Charlotte depot, not to ship on defendant's road to Columbia until ordered to do so by plaintiff, and defendant's agent did ship said tobacco without awaiting such orders, and within the time stated by the witness Martin, and afterwards the tobacco was destroyed by fire in Columbia, on the 17th of February, 1865, the plaintiff would be entitled to recover such sum as the jury find the tobacco to have been worth in Charlotte at that time, and the jury may give interest on that amount from the time of the loss of the tobacco.

2. That if the jury find the facts to be as above stated,
(36) then it is immaterial whether J. K. Pinnix gave his instructions to the *defendant* in writing, or whether

Martin said on the return of J. K. Pinnix, that "his clerks had either misunderstood or disobeyed him," and also whether Martin was present at the loading into the defendant's car of a few of the remaining 42 boxes, or whether J. K. Pinnix had the conversation with Wm. Johnston or not.

3. That if plaintiff, J. K. Pinnix, instructed A. H. Martin, defendant's agent, not to ship the tobacco to Columbia until he was ordered to do so, although plaintiff was a stranger to said Martin, and exhibited no receipt, yet as Martin did not notify him, that he required him to furnish him evidence of his ownership, of said tobacco, before he would obey instructions, that the defendant would be bound to obey such instructions, and if the defendant afterward shipped the tobacco to Columbia, and it was burned in Columbia, and proved a total loss to plaintiff, then the defendant would be liable for the value of the tobacco.

The counsel for the defendant asked the Court for the following instructions, viz.:

I. That an action of tort cannot be sustained upon the facts of this case.

II. That if the jury find that there was no contract made between the plaintiffs and Martin, as agent of defendant, as to the keeping of the tobacco for them, until the return of J. K. Pinnix, from Columbia, then there was no breach of duty, and the action in tort cannot be sustained.

III. Trover will not lie, because the allegation, if established, created a bailment, and the principle is, where property bailed has been lost by negligence of the bailee, trover will not lie.

IV. The plaintiffs allege that there was a contract, and a breach of duty under it, and he must establish the truth of his allegation by a preponderance of testimony, otherwise the jury must find for the defendant on this part of the case.

V. The tobacco was not in the possession of Martin,
(37) as agent of defendant, at the time notice was given to him to stop it, and to hold it for further directions from plaintiffs, and therefore the principle of "stoppage *in transitu*" does not apply.

VI. Before the plaintiffs could constitute Martin, as agent of defendant, his bailee, he must pay the expenses on the tobacco to the North Carolina Railroad, receive the tobacco from it, and deliver it to the defendant's agent.

VII. Before defendant was bound to heed the notice of plaintiff, not to forward the tobacco, as Martin did not know

him, it was the duty of plaintiff to furnish Martin with reasonable proof that he had the legal right to control the tobacco.

VIII. The agent of the North Carolina Railroad was the forwarding agent of the plaintiffs, and when the tobacco was delivered by the agent of that road, the defendant was bound to forward it to the consignee.

IX. That as the goods were received by the consignee in Columbia in good order, and taken charge of by him, with approval of plaintiffs, and ordered to be sold, that the liability of defendant as a common carrier ceased, and plaintiffs are not entitled to recover, or if entitled to recover at all, are only entitled to nominal damages.

X. Defendant was a common carrier and not a warehouseman, and as such was not under legal obligation to receive the goods of plaintiff and hold the same subject to his will.

His Honor, amongst other matters not excepted to, instructed the jury as follows:

That this case was to be tried like all other cases between individuals, remarks about bloated corporations have nothing to do with it. The first question is, has a wrong been done to the plaintiffs? Plaintiffs allege that defendant is responsible for their lot of tobacco. If defendant received the tobacco, the relation of bailor and bailee was created. The witness Pinnix says, he went to Charlotte and told agent of defendant not to ship the tobacco to Columbia until
(38) further orders; also that 88 boxes were sent to Columbia in violation of his orders, and he lost the tobacco, and that if his orders had been obeyed, he would not have lost it. The witness Pinnix says, he told defendant's agent not to ship the tobacco until he returned from Columbia.

If you believe the tobacco was shipped contrary to plaintiffs orders, and plaintiffs lost it in consequence of it, plaintiff can recover something, at least. But the witness Martin says, he did not know Pinnix was the owner, and therefore disobeyed him, and was not bound to obey him, and did not promise to hold the tobacco; that would be so if he had asked Pinnix to identify himself, that is a question for you. Pinnix said, he (Martin), never requested him to identify himself, and that Martin said that his hands had violated orders.

Then how much can the plaintiff recover on the counts in the case?

Plaintiff can recover whatever damages *he* sustained by disobedience of *his* orders, and it is for you to find the value of the tobacco, or whatever of it you say he lost by his orders being disobeyed. The evidence was, there were 88 boxes and 100 pounds to the box, and the value according thereto, ranged from ten cents to seventy cents per pound, that the condition of the country made it difficult for persons to retain possession of property at that time, and it is for you to say what it was worth under all the circumstances.

The defendant asks me to charge, that before plaintiffs can recover, he must offer a preponderance of testimony, that if the evidence is equal, the plaintiff cannot recover; this is so, it must preponderate in favor of the plaintiff before he can recover.

The counsel for plaintiff asked the Court to give the instructions, heretofore set forth, which were allowed by His Honor, and the jury instructed in accordance therewith, with the further instruction: that if the jury found for plaintiff, they would find the value in United States currency;
(39) they should consider what tobacco of that quality was worth in Salisbury and Columbia, in order to find the value at Charlotte, and also to consider what Pinnix said in his letter as to its value.

Counsel for defendant asked the Court to give the instructions heretofore set forth. As to the I and II, His Honor charged: if the defendant received the tobacco as a common carrier, the relation of bailor and bailee would be established, and then if the orders were given to retain the tobacco and disobeyed, plaintiffs would be entitled to recover

That as to instruction No. III, His Honor charged there was a count in case in the declaration, and also in trover, and that plaintiff could not recover in trover; as to No. IV, he stated he had given instructions as to the preponderance of testimony; as to the V, he charged that if the property came into the possession of Martin, as agent of defendant, after the order was given, it was "*en route*," and he would be bound to obey instructions. VI instruction refused, if defendant received the property it made no difference whether freight was paid or not; as to VII instruction, he charged, this would be true if Martin had demanded it. J. K. Pinnix said he was one of the firm of J. K. and M. H. Pinnix, and if Martin had said, "I do not know you," he should

have offered evidence to identify himself, and whether he did or did not, was for the jury.

The VIII instruction, refused, that the owner of the tobacco had a right to control it.

The IX and X instructions refused. His Honor further charged the jury, that plaintiffs can only recover, in *case*, whatever the jury find that they suffered by a failure of defendant to stop their tobacco, and it was for the jury to say, whether the damage was for the total loss, or partial loss. His Honor left it as a question of fact for the jury whether plaintiffs had instructed defendant's agent not to ship, reciting in that connection, in short, both the testimony of J. K. Pinnix and A. H Martin.

Under these instructions a verdict was rendered for
(40) the plaintiffs; and from the judgment rendered, the defendant appealed.

J. H. Wilson, for the appellant.
Blackmer & McCorkle, and *Bailey*, for appellee.

PEARSON, C. J. The plaintiff's counsel asked His Honor to instruct the jury, that "if plaintiff, before defendant, received the tobacco, instructed the defendant's agent at the Charlotte depot, not to ship on defendant's road to Columbia, until ordered to do so, by plaintiff, and defendant's agent did ship the tobacco without awaiting such orders, the plaintiff was entitled to recover. His Honor so charged, and the case is made to turn upon the right of the plaintiff to give the order and have it obeyed. In this there is error.

The contract was to carry the tobacco from Thomasville to Columbia, and there deliver it to the plaintiff's consignee; we see no principle upon which the contract can be modified by inserting a provision, that the plaintiff shall have the right to order the tobacco to be held over at Charlotte for a few days. It takes two to make a contract, and two to modify or vary it. A contract once made cannot be dissolved or varied, except the consent of both of the contracting parties. This is a plain principle. The plaintiff's counsel, when pressed with it, was not able to cite a case or to give any satisfactory reason in support of the position taken by him. How did the plaintiff acquire a right to give orders to the defendant's agent to hold over the tobacco to an intermediate place between Thomasville and Columbia? We can

only look to the contract, and there is no such stipulation in it.

It may be, that its agent by an express contract to hold goods over for a few days, at an intermediate station, can bind the company. The supposed consideration being a general benefit, of an increase of business, by accommodation of this kind extended to customers; but it is certain, this new contract, or rather this addition to the origi-
(41) nal contract, must be express, and there is nothing from which it can be implied, or it may be, that a promise of the agent to hold the goods over at Charlotte, will be treated as a mere act of complaisance on his part, but *nudum pactum* in respect to the company. If the purpose of the plaintiff was to reserve the right to hold the goods over at Charlotte, why did he not have that stipulation set out in the receipt of the bill of lading?—or why did he not ship to Charlotte in the first instance? This point is not presented, and we express no decided opinion.

The fact of an express promise by the agent ought to have been passed upon by the jury, and the defendant has a right to complain that the instruction excluded the question.

A shipper has no right to have the goods delivered to him, at an intermediate station where the bulk is not broken, except by the assent of the company; even if he should offer to pay the freight, through, to the point of destination; for, it is not in the contract. We are inclined to think, however, that at a station like Charlotte, where the bulk is broken, that is, where the goods are unloaded, and transferred to another car or to the warehouse, the shipper may, upon tendering the full freight, and indemnity against the consignee, require that the goods be delivered to him there, and not be carried further. On the principle, that having the goods carried, is for his benefit alone, and he may dispense with a part of that stipulation in the contract, the freight being all that concerns the company; as, if one employs an overseer for a year at a fixed price—by paying up the full price, he may dispense with further service; but this is a very different thing from instructing the agent, at an intermediate station, to hold the goods over until further instructions; thereby holding on to the contract, and adding to or varying its terms. This can only be done, if at all, by express agreement, with the agent acting for the company.

The defendant's counsel asked His Honor to instruct the

jury, that "if the plaintiff was entitled to recover, the
(42) damages should be nominal." This, His Honor refused, but in effect charged that the measure of damages, was the value of the tobacco at Charlotte, on the day it was sent off. In this there is error.

The plaintiff received his tobacco in Columbia, and his consignee stored it in his own warehouse. If the plaintiff did not conclude to keep the tobacco, all he had to do was to send it back to Charlotte, and the measure of damages would have been the cost of sending it back, and compensation for the delay. He did not, however, choose to send it back, but had it stored in Columbia, and the measure of damages is the same, certainly it cannot be more, for the plaintiff made his election to keep it in Columbia with full knowledge of the surrounding circumstances; indeed, if the price of tobacco was as good in Columbia as at Charlotte, it would seem the damages should be nominal. It was suggested that the receipt of the tobacco and having it stored in Columbia, was a waiver of the liability of the defendant for sending it without orders, or at least reduced the damages to a mere nominal sum—we do not think so, for the plaintiff was not obliged to give up his tobacco, by refusing to receive it in Columbia and charge the whole value to the defendant; nor was he obliged to send it back and charge the defendant with the expense and delay—he had his election to receive the tobacco and keep it in Columbia, and charge the defendant with what it would have cost to put the tobacco back in the place from which it was wrongfully sent.

The case of *Bell* v. *Bowen*, 1 Jones, 316, relied on by the plaintiff, for fixing the value of the tobacco at Charlotte as the measure of the damages, does not sustain the position. There, if the man was carried out of the county, or worked on water, it was to be at the risk of the bailee; the contract was violated and the negro died during the year, *so that the owner never got him back;* here the plaintiff did get his tobacco back. Note the diversity.

Suppose, in that case, the negro had been alive at the
(43) end of the year, sound and hearty, but the bailee had refused or neglected to send him home, and the owner was obliged to go to the other county and get him; the measure of his damages would have been, the sum expended in bringing him home, and something for the delay.

So, in our case, the measure, is, the sum that would have

been necessarily expended in putting the tobacco back where it was before and something for the delay; indeed, this seems to have been the measure fixed by the plaintiff, in his own mind, when he required the President of the road to have the tobacco brought back to Charlotte this the President, it seems, declined to do, probably because he did not admit the right of the plaintiff to order the agent of the company to hold the tobacco at Charlotte. The effect of this refusal, was only to put on the company, a liability to pay, what it would cost to send it back, and compensation for the delay; *provided*, the President was mistaken as to the right of the plaintiff to require that it should be sent back. But, it is said that would all have been well enough, if the tobacco had not been burnt, when Sherman's army occupied Columbia. This is the gravemen of the action. We are unable to see how the act of the defendant, in sending the tobacco from Charlotte to Columbia, contrary to orders, was the cause of its being burnt, some ten or fifteen days afterwards, when Gen. Sherman's army occupied Columbia. The coming of Gen. Sherman and the fire was not a necessary or a probable consequence of sending the tobacco to Columbia. In the language of the books the cause is not proximate, but remote; and in fact altogether unexpected. On the 1st of February, the plaintiff ships his tobacco to Columbia; on the 7th February, he writes to his consignee, after having in the meantime visited Columbia, how to dispose of the tobacco, and wishes to be advised as to prices for the purpose of sending more; so he had no fear that Sherman would come, and that his coming would incidentally cause the the tobacco to be burnt. It is not
(44) for him, now to say, that the sending of the tobacco to Columbia on the 4th of February was the cause of its being burnt. In short, that was a result not looked for by him or by the defendant; and as he had the tobacco stored in a private warehouse, to be used by himself to the best advantage, the loss must fall upon him. I hire my riding horse, to be returned in two days; the bailee neglects to return the horse. In the meantime I have occasion to go to some place, and for the want of a horse undertake to walk, and trip so as fall and break my leg. Is the bailee liable to pay for this injury, or only to make compensation for the proximate and natural consequence of his violation of the contract? Again, a railroad by negligence fails to make connection; a passenger happens to be under recognizance to appear at some

Court; forfeits his recognizance and has to pay a large amount by reason of his failure to appear. Is the railroad company liable to pay the amount of the recognizance or only the ordinary and necessary expense caused by the delay? Carry the illustration from *Bell* v. *Bowen* further: Suppose the owner at the end of the year had received the slave, and while re-crossing Albemarle Sound the slave happened to be drowned, the loss would fall on the owner, for the act of taking the slave out of the county, is not the proximate cause of his death, although it may be, that but for that, he would not have been drowned Broom's Legal Maxims, 203, 209. Mayne, on the law of damages, 15.

These are familiar and settled principles. The only difficulty is in making the application. We are satisfied His Honor erred in supposing that the act of the defendant, in sending the tobacco from Charlotte to Columbia, on the 4th of February, was the proximate cause of the fact that the tobacco was burnt on the 17th of February, thirteen days thereafter. Follow out the reasoning, and the defendant would have been chargeable with the value of the tobacco,
(45) if it had been destroyed six or twelve months after it was sent from Charlotte.

ERROR. *Venire de novo.*

CHARLES SKINNER *v.* D. G. MAXWELL.

1. When an infant purchases a stock of goods, for the purposes of trade and merchandise, and to secure the purchase money executed a note and mortgage of the stock of goods, such contract is voidable and may be disaffirmed by such infant by any act which manifests such a purpose.
2. The effect of such disaffirmance is to restore the property, which remains, to the person from whom it was obtained.
3. The power to appoint a receiver is necessarily inherent in a Court which possess equitable jurisdiction, and it is exercised when an estate or fund is in existence, and there is no competent person to hold it, or the person so entitled is in the nature of a trustee, and is misusing or misapplying the property. The Code of Civil Procedure does not materially change the equitable jurisdiction of our Courts on the subject. —C. C. P., Sec. 215.
4. On the principle of protection, a receiver may be appointed of an infant's estate if it be not vested in a trustee; and when there is a mixture of property and the different interests of the parties cannot be ascertained until proper invoices are made, and a division effected under the direction of the Court—*Held*, to be a clear case for the appointment of a receiver.

Adams' Equity, 352–53.
1 Parsons on Contract, 329.
8 Jones, 125. Cited and approved.

This was a motion for an injunction and the appointment of a receiver heard before Logan Judge, at Fall Term 1871, of Mecklenburg Superior Court.

The facts of the case, upon which the judgment of the Court is rendered are fully stated in the opinion of the Court.

From the order of injunction and the appointment of a receiver, the defendant appealed, to the Supreme Court.

(46) *Bynum, Jonnes & Johnston* for plaintiff.
Barringer, Vance & Dowd for defendant.

DICK, J. The plaintiff purchased a stock of goods from the defendant for the purpose of carrying on the business of trade and merchandise. He paid a certain amount in cash and executed a note for the balance of the purchase money which he secured by a mortgage on the stock of goods. After this purchase the plaintiff bought other goods, which in the course of his business, were placed in the store with the stock which he had received from the defendant.

The day of redemption, specified in the mortgage, having passed without payment, the defendant as mortgagee, took possession of all the goods in the store, and against the will of the plaintiff, was about to sell the same to satisfy the mortgage debt. This suit was commenced for the purpose of rescinding the contract of purchase and the mortgage, and order for an injunction, and the appointment of a receiver was asked for to prevent the sale, and protect the property until the rights of the parties in this controversy are determined by the Court.

The plaintiff alleges in his complaint that at the date of his contract with the defendant, he was an infant and still continues of nonage, and demands by way of relief, that said contract and mortgage be entirely rescinded &c. This allegation of infancy is not denied in the answer and is thereby admitted for the purposes of this action.

We will not consider the questions of fraud mentioned in the complaint, or the merits of the controversy, as the plaintiff is entitled to a rescission of the contract on the ground of his infancy.

As a general rule the contract of an infant is not void, but voidable. Such a contract is incapable of being enforced at law by the adult party, if the infant choose to plead his infancy. It is however capable of being ratified by the infant when he attains his majority.

Contracts entered into by infants for the purpose of
(47) business and trade are viewed with great suspicion by the Courts, and have been frequently declared absolutely void. The Courts are very watchful over the rights of an infant, who in contemplation of law is incapable of carrying on business and trade with proper discretion; and a contract made by him for this purpose, if it is manifestly prejudicial to his interests, will be set aside.

The principles which govern the contracts of infants are not distinctly defined and well settled in the books, but the better opinion seems to be, that every contract of an infant, is capable of being ratified, and is therefore only voidable.

When an infant is sued upon a contract, he can protect himself from a recovery by a plea of infancy; but he does not have to wait until he is sued in order to disaffirm his contracts.

Contracts which relate only to persons or personal property may be avoided by an infant during his minority by any act which clearly manifests such a purpose. 1 Parsons, 322.

The effect of such disaffirmance is to restore the property which remains to the person from whom it was obtained by the infant. It is held that an infant cannot, during his minority, completely avoid a contract relating to land, but his disaffirmance only suspends the matter, and when he arrives at age, he is at liberty to revive and enforce such contract. 1 Parsons, 322. 8 Jones, 125.

In our case, the infancy of the plaintiff being admitted in the pleadings, the prayer of the complaint, disaffirmed the contract of purchase and the mortgage, and the defendant became entitled to so much of the property in the store as belonged to the original stock, and the plaintiff was entitled to the goods afterwards purchased by him. The prayer for an order of injunction, and for a receiver was properly allowed by His Honor. The power to appoint a receiver is necessarily inherent in a Court which possesses equitable jurisdiction and it is exercised when an estate or fund is in existence, and there is no competent person entitled
(48) to hold it; or the person so entitled is in the nature of a trustee and is misusing or misapplying the property. Adams Eq., 352.

The Code specifies certain cases in which a receiver may be appointed, but does not materially alter the equitable jurisdiction of our Courts upon this subject. C. C. P., section 215.

Where property is the subject of an action and is liable to clear equities in a party out of possession, the Court may appoint a receiver, when it seems just and necessary to keep the property in dispute from the control of either party until the controversy is determined.

The property is thus placed in the hands of an officer of the law, so that it may be under the protecting care and control of the Court, and be delivered unimpaired to the person who is legally ascertained to be the rightful claimant.

On the principle of protection, a receiver may be appointed of an infant's estate, if it be not vested in a trustee, for he is incompetent to take charge of it himself. Adams Eq., 353.

This power is often exercised in the case of partnerships, where one of the partners gets the business and effects in his hands and is misusing them, or is claiming the right to exclude his co-partners from the concern. The object is to secure the property until the joint business is wound up and the rights and liabilities of the partners are ascertained and adjusted.

In our case there is a mixture of property, and the defendant is in the possession, and claims the right to dispose of the whole stock of goods for his own benefit.

The disaffirmance of the contract by the plaintiff restored to the defendant his right of property in the goods which he sold, but the different interests of the parties cannot be ascertained until proper invoices are made, and a division effected under the direction of the Court.

We are of the opinion that this is a clear case for the appointment of a receiver, and the order made by His Honor must be affirmed. Let this be certified.

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(49) BENJAMIN ASKEW *v.* JAMES M. POLLOCK, *et. al.*

"All Acts and proceedings by or against, a county in its corporate capacity, should be in the name of the Board of Commissioners." Acts of 1868, Ch. 20.

An order to show cause, which is in the nature of an alternative writ of mandamus, ought not to be directed to the individuals composing the Board of Commissioners. It is only in case of disobedience that they can be proceeded against individually.

When an erroneous ruling is the ground for an appeal, an amendment cannot be allowed in the Supreme Court, which would defeat the cause of appeal.

Commissioners of Cleveland *v.* Pegram, *cited and approved.*

ASKEW *v.* POLLOCK.

Petition for a peremptory mandamus, heard before Clarke, Judge, at Fall Term 1871, of Jones Superior Court.

The case as stated on the record is, "Benjamin Askew *v.* James M. Pollock, Ch'n, Thomas G. Wilson, &c., Commissioners of Jones county.

The petition sets out that the county of Jones is indebted to the petitioner "in the sum of fourteen hundred and eighty dollars and sixty seven cents, for services rendered the said county, under a contract with the proper authorities thereof, and also for claims transferred to him, &c., that the claim was presented to the commissioners of the county, and was fully approved by the said Commissioners, and that the payment has been refused, &c." The prayer is, "Your Honor, to order that the sum aforesaid, due and acknowledged, be paid by the defendants, or on failure, that they be required on a day to be named, to appear, and show cause to the contrary." And also, "That the clerk issue copies of the petition and order, and that upon failure to make payment, or show sufficient cause to grant a peremptory mandamus," &c.

(50) Upon this petition, His Honor issued an order, substantially as follows:

"The Clerk of the Superior Court of Jones, will issue copy of the petition to the defendant as prayed for. It is further ordered that the defendants pay to plaintiff $1,482.67, the amount stated to be due, or on failure to do so, that they show cause on 27th day of December, at the Court House in Trenton to the contrary."

And at the Fall Term 1871 of the Court, the petition and order is returned endorsed. "Copy of this petition and order delivered to J. M. Pollock, John Marret, Commissioners of Jones county." Signed by the Sheriff. Motion to quash was made by the defendant. The motion was overruled, and defendants appealed.

J. H. Haughton for plaintiff.
Green for defendant.

DICK, J. The plaintiff alleges that he is a creditor of the county of Jones, and he seeks to enforce the payment of his claim by a writ of mandamus.

The proceedings were instituted against certain individuals, styling themselves Commissioners of Jones county. The statute expressly requires, "All acts or proceedings by or

against a county in its corporate capacity should be in the name of the board of commissioners." *Commissioners of Cleaveland* v. *Pegram*, 65 N. C., 114.

The order to show cause, which is in the nature of the alternative writ of mandamus, ought not to have been directed to the individuals composing the Board, as it is only in case of disobedience that they are liable to be proceeded against individually.

The defendants moved to quash the proceedings as they are not in accordance with the requirements of the statute.

This motion was in the nature of a special demurrer, and ought to have been allowed, unless there was a motion
(51) to amend. It is all important that the forms required by law shall be complied with, so that legal proceedings may be conducted with regularity, precision and certainty. No motion for an amendment was made, and His Honor refused to quash the irregular proceedings. In this there was error. As this erroneous ruling was the ground for the appeal for the defendants, an amendment cannot be allowed in this Court, which would defeat the cause of appeal. We must decide this case as His Honor ought to have done upon the proceedings as they appeared before him. The proceedings must be quashed, for the cause assigned by defendants.

In the Matter of the last Will and Testament of J. B. BELCHER.

A paper writing, written in any form, whether as a deed of gift, deed of sale, or indenture, may be propounded as a will, and operates as such, if it appears to have been the purpose of the maker of such instrument, that it should take effect after his death. The words, "I give at my death," are operative words, and evidence of testimentary intent. *Henry* vs. *Ballard*, 2nd C. L. R., 595.

This was an issue of *devisavit vel non*, tried before Moore, Judge at Spring Term 1871, of Edgecombe Superior Court.

In was in evidence, by a witness, William A. Darden, Jr., that while his command was at Sullivan's Island, near the city of Charleston, about the 1st of July, 1863, he was asked by John B. Belcher to write his will. Paper writing was drawn by the witness, of which the following, as he recollects, is a correct copy:

"Know all men by these presents, that I, John B. Belcher, of the State of North Carolina, Edgecombe county, for and in

consideration of the natural love and affection, which I have for my aunt, Martha A. Belcher, do give at my death, unto her, the said Martha Belcher, her heirs and assigns, all
(52) the right and interest in the lands formerly belonging to my mother, obtained in the division of the lands of Alexander Cotter, deceased, and the interest conveyed to the said Martha Belcher, I, said J. B., shall forever warrant and defend against the claim or claims of all persons whatsoever.

In testimony, whereof, I, the said John B. Belcher, have hereunto set my hand and seal, this___day of July, 1863.

JOHN B. BELCHER, [SEAL.]

Witness,
W. A. DARDEN,
J. A. NORMAN."

That witness, and J. A. Norman, signed the paper as "witnesses," at the request, and in presence of, the said Belcher, he thought also, that one J. J. Lane signed as a witness, at his suggestion. The subscribing witness, Norman, stated substantially the same thing. He, however, says nothing of Lane's signing the paper as witness. There was no testimony to show that Lane was dead or could not be found. There was evidence to show that the original paper writing was placed in the hands of R. H. Pender, and by him placed in an iron safe among his valuable papers, and that it was burnt after the death of Belcher, by one D. Pender, who supposed it to be of no value.

The caveators insisted that the paper writing could not be propounded as a will, because it differed from what was alleged in the petition of the propounder. The Court held that it was substantially the same, though different in form: "The Court instructed the jury, that if they were satisfied from the testimony of Darden and Norman, that the alleged testator executed the paper, in the manner stated by them, and that after his death it was destroyed, in the way testified to by the witnesses, the Messrs. Pender, it was their duty to find in favor of the defendant."

(53) The jury found a verdict in favor of the propounder.

The counsel for the caveator asked for a new trial, upon the ground that it appears in the petition of the propounder that J. J. Lane, and two other persons, were the attesting witnesses, and that Darden's testimony tended to establish the same fact; and that it was the duty of the Court

to have charged, although not specially requested, the jury, that if the whole testimony satisfied them that there were three attesting witnesses to the alleged paper writing. The Court refused to grant a new trial and directed a *procedendo* to issue to the Probate Judge, &c.

The petition of the propounder before the probate Judge, professing to set out only the substance of the will, stated that there were three subscribing witnesses.

The caveators appealed from the judgment of the Court.

No counsel for plaintiff.

Rattle & Sons for defendant.

BOYDEN, J. There were only two questions made in the argument of this case.

1. That the will attempted to be set up by the propounder was different in form, from that found by the jury.

2. That the petition of the propounder alleged, that the will had three subscribing witnesses; and that this being alleged in the petition, all the three witnesses, should have been called, or their absence accounted for.

The Court is of opinion, that the will as found by the jury is in substance the same as alleged in the petition.

True, it has the form of a deed; but it has proved that the will was made when the testator was *inops consilli* and that the draftsman was requested to write a *will*, and in the instrument the operative words are, "I do give at my death."

The jury have found this to be a will. In the case of *Habergham* v. *Vincent*, 2d Vesey, Jr., 204. Justice Butler at page 330 of the case says, "that the cases had estab-
(54) lished, that an instrument in any form, whether as a deed-poll or indenture, if the obvious purpose is, not to take place till after the death of the person making it, shall operate as *a will*. The authorities for that are both at law and in equity. In one of the cases there were express words of immediate grant, and a consideration to support it as a grant, but as upon the whole, the intention that it should have a future operation after his death, it was considered as a *will*.

In the case of *Jack* v. *Henderson*, 1 Deans, 554, it is said, "that a will may be made in any form provided the formalities required by law be complied with. It may be in the form of a deed of gift, provided, it is the intent of the testa-

tor that it should operate after his death. *Thwold* v. *Thwold*, 1 Phill., 1, and cases cited." The case of the executors of *Henry* v. *Ballard and Slade*, 2 Carolina Repository, 295, decides that the paper propounded as a will, though in the form of a deed, as in this case, yet as the instrument of writing was made with a view to the disposition of the estate, after the death of the maker, and although the testator was advised to make a deed, yet the whole structure and operation showed it to be a testamentary paper. The other point as to a third subscribing witness, who was not called at the trial, nor his absence accounted for, it is sufficient to remark that the verdict of the jury has precluded that question; as they have found that there were in fact only two subscribing witnesses, but if it were not so, the caveator could not avail himself of this objection, in the manner attempted in this case.

There is no error. This will be certified that such other proceedings may be had as the law requires.

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(55) O. SPRINKLE *v.* JULIUS MARTIN *et al.*

Where a debtor conveys property, in trust to sell and pay certain creditors, the trustee holds in trust for the creditors, and then in trust for the debtor as a resulting trust. This resulting trust cannot be sold, under execution as an equitable estate, for, by the provisions of the statute, the purchaser at execution sale takes the legal as well as equitable estate, which would cut off the creditors.

After the debts are paid, the resulting trust is liable to sale under execution. But a mixed trust cannot be sold in that way.

Thompson v. *Ford*, 7 Ired., 418; *Harrison* v. *Battle*, 2 Dev. Eq., 537, approved.

This was a civil action for the recovery of the possession of a tract of land and damages for the detention thereof, tried before Mitchell, Judge, at Fall Term, 1871, of Wilkes Superior Court.

Plaintiff showed a deed in trust from himself to C. L. Cook, made to secure a debt to Jenkins and Roberts, bearing date March 27th, 1855, and which covered the land in dispute, and a deed from Cook reconveying the land, and dated 12th March, 1869. He also, for the purpose of showing that the defendant claimed under the same title, and for no other purpose, introduced a copy of a deed from E. Staley, Sheriff of Wilkes, to the defendants, reciting that he had sold the

land in controversy, as the property of O. Sprinkle, on the 3rd day of May, 1858.

Defendants offered in evidence a transcript of record from the Superior Court of Mecklenburg county, setting forth a judgment obtained in said Court, by Springs & McLeod against O. Sprinkle, at Fall Term, 1856, of said Court, and a *fi. fa.* issued thereon to Spring Term, 1857, which execution was returned unsatisfied. Also stating, that an alias *fi. fa.* had issued from Spring Term to Fall Term, 1857, and returned unsatisfied. It was also stated that a pluries
(56) *fi. fa.* had been issued, returnable to Spring Term, 1858, of Mecklenburg Court, which was levied upon plaintiff Sprinkle's interest in said land, and that the same was sold. The return did not state to whom the land was sold. No *fi. fa.* was set out in the transcript, except the one to Spring Term, 1857, Defendants offered a deed from the Sheaiff of Wilkes to themselves as purchasers. Plaintiff objected to the introduction of the deed. The Court overruled the objection. The plaintiff asked the Court to charge the jury, that as both parties claimed under the same parties, and as the plaintiff claimed through Cook, whose deed bears date 27th day of March, 1855, a date prior to the execution, under which defendants claimed, plaintiff was entitled to recover. The Court declined so to charge, and instructed the jury that the plaintiff being maker of the trust to Cook, had a legal interest on the 3rd day of May, 1858, which was liable to execution and sale, and the defendants being the purchasers thereof, plaintiffs would not recover. Verdict for the defendants. Rule for a new trial. Discharged. Appeal, etc.

Furches, for plaintiff.
Armfield, for defendant.

PEARSON, C. J. The defendant acquired no title by his purchase at the Sheriff's sale, for Sprinkle (the defendant in the execution) had no estate or interest in the land, which could be sold by the Sheriff under execution. *Thompson* v. *Ford*, 7 Ired, 418; *Harrison* v. *Battle*, Dev. Eq., 537. When a debtor conveys to a trustee, in trust to sell and satisfy certain creditors, the trustee holds in trust for the creditors, and then in trust for the debtor, as a resulting trust. This resulting trust cannot be sold as an equitable or trust estate,

for, by the provision of the statute, the purchaser at execution sale takes the legal, as well as the equitable estate, which would cut off the creditors who are secured by
(57) the deed of trust. After all the debts secured by the deed of trust, are satisfied, the resulting trust becomes liable to sale under execution, for the purchaser may then take the legal as well as the equitable estate, without prejudice to third persons. Such was the case in *Harrison* v. *Battle*. But where there is a mixed trust, as in our case, that is, a trust to pay debts which are unsatisfied and a resulting trust for the debtor, such resulting trust cannot be sold under execution; for the purchaser cannot take the legal estate without prejudice to the creditors named in the trust as in *Thompson* v. *Ford*, and in our case. So, His Honor erred in his instruction, "that the plaintiff being the *maker of the trust to Cook, had a legal estate in him* on the 3d day of May, 1858, liable to execution and sale."

The plaintiff at that time had no legal estate, and his resulting trust was not liable to execution sale.

Error. *Venire de novo.*

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(58) W. R. S. BURBANK *et al. v.* S. H. WILEY *et al.**

A decreee *ought* in all and *must* in cases of an equity character arising under the C. C. P., declare the facts upon which the law is adjudged.

In equity cases pending at the adoption of the C. C. P., this Court can either try the facts or direct issue to be sent down, but usually adopts the latter course as in this case.

This was an equity cause pending in the Court of Equity for Beaufort county at the adoption of the Code of Civil Procedure, and was transferred to the Superior Court under the provisions of the Code.

At Fall Term, 1870, His Honor, Judge Jones, proceeded to render a decree in the old form, which, however, contained no declaration or finding of the facts, nor did they otherwise appear from the papers, to have been found.

From this decree the defendant appealed.

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* This case was decided at January Term, 1871, but by some oversight, was not reported. The Attorney General considers it as involving a question of practice of sufficient importance to require a report even at this time.

Fowle, for the plaintiff.

McCorkle & W. H. Bailey, for defendants, moved to remand for the above stated defect.

READE, J. A decree ought to declare the facts, upon which, the law is adjudged. Under the C. C. P., when that is not done in new cases, we have to send the case back because we can try no issue of fact. It is otherwise in equity cases pending at the adoption of C. C. P., as this case was. But even in old cases we usually direct issues to be sent down.

The decree in this case declares no facts, and the issues (59) are such as we are unwilling to try. We have, then, either to send down issues or to remand the case that his Honor below may, in such way as may seem to him best, find the facts. To this end the judgment is reversed and the case remanded.

STATE ex rel. C. C. CLARK and others *vs.* E. R. STANLEY and others.

1. "The Governor shall nominate, and, by and with the advice and consent of a majority of the Senators elect, appoint, all officers, whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly. Section 10, Article 3, Constitution."

2. The words contained in the above section of the Constitution, "whose appointments are not otherwise provided for," mean provided for by the Constitution, and the words "n such officer shall be appointed or elected by the General Assembly," are superadded as an express veto upon the power of the General Assembly, whether such office be established by the Constitution or be created by an Act of the General Assembly.

3. A public office is an agency for the State; and the person, whose duty it is to perform that agency, is a public officer. Nor does it make any difference whether he receives a salary and fees and takes an oath, these being mere incidents and no part of the office itself. Nor is it material whether one act or a series of acts are required to be done.

4. The Act of the General Assembly, passed April 6th, 1871,* giving to

* An Act to change the method of appointing proxies and directors in all corporations in which the State has an interest:

Section 1. *The General Assembly do enact*, That all power now vested in the Governor of the State to appoint a proxy or proxies or directors to represent the interest of the State, in any corporation or Company in which the State has an interest, be and the same is hereby revoked and annulled.

Section 2. That the President of the Senate and Speaker of the House of Representatives, are hereby authorized and empowered by a paper writing signed by them, to appoint all proxies and directors in all corporations in which the State has an interest.

Section 3. All laws in conflict with this Act are hereby repealed.

Section 4. This Act shall be in force from and after its ratification.

Ratified 6th day of April, 1871. 56

the President of the Senate and Speaker of the House of Representatives, the power to appoint "all proxies and directors in all cor-
(60) porations in which the State has an interest," creates a public office and fills the same by appointment of the Legislature. It is therefore unconstitutional.

5. The power of the General Assembly to repeal an Act, which had been passed since the adoption of the Constitution, and accepted by the Railroad Company as an amendment to their charter, discussed by Pearson, C. J.

Hoke vs. *Henderson*, 4 Dev. 12.
Worthy vs. *Barrett*, 63 N. C. R. 199, cited and commented on.

This was an action in the nature of a *Quo Warranto* brought by the relators of the plaintiff against the defendants. The summons was returnable to Fall Term 1871 of Craven Superior Court. Before the application of the relators of the plaintiff an order of injunction had been issued by His Honor R. P. Dick, restraining the defendants from leasing or disposing of the property and franchise of the Atlantic and North Carolina Railroad Company to the Pennsylvania Central Railroad Company or to any other person until the further order of the Judge of the 3d Judicial District. At the return term of the Superior Court for Craven county, the defendants filed their answer, and on motion, the injunction order theretofore issued was vacated by His Honor, Wm. J. Clarke and judgment rendered against plaintiff for costs. From this judgment the relators of plaintiff appealed to the Supreme Court. To understand the opinion of the Court, a brief statement of the facts is all that is thought to be necessary. The relators of the plaintiff alleged in their complaint, in substance, that they were the legal and rightful Board of Directors of the Atlantic and North Carolina Railroad Company; that by virtue of an Act of the General Assembly, ratified on the 6th day of April, 1871, authorizing and empowering the President of the Senate and Speaker of the House of Representatives to appoint proxies and directors on the part of the State in all corporations in which the State has an interest. E. J. Warren, President of the Senate, and Thomas J. Jarvis,
Speaker of the House of Representatives, had issued
(61) commissions to C. C. Clark and others as directors on the part of the State in said Railroad Company; that at a regular meeting of the Stockholders other directors were elected to represent the private Stockholders, and that a President and other officers were elected. That the defendants are now in possession, claiming to be directors and refused to

surrender possession of the property, &c., of the said Company, and that they had intruded into and usurped the offices of the said Railroad Company without authority of law. They asked judgment that they be declared the legal and rightful Directors of the Atlantic and North Carolina Railroad Company, that the defendants be ousted therefrom, and plaintiffs be put in possession; for an injunction and receiver.

Defendants in their answer insisted that they were the rightful directors of the A. & N. C. R. R. Co. That they claimed to hold the same under the provisions of the charter and the law of the land, authorizing and empowering the Governor of the State to appoint directors, &c. That the Governor had issued commissions to a number of the defendants as directors on the part of the State and that the others had been legally and properly elected in a meeting of the Stockholders under the provisions of the charter of the company. They denied the right of the plaintiffs under the appointments made by the President of the Senate and Speaker of the House of Representatives. That the Act of the General Assembly which conferred this power upon them was unconstitutional.

J. H. Houghton, who appeared for the relators took the following positions, which were elaborately argued:

I. That the Constitution, sec. 1, Art. 3, has created the office of Superintendent of Public Works. In sec. 13 of same Article, it is declared that his duties shall be prescribed by law, and that such duties were prescribed by the Act of 1868–'69, chap. 270.

II. That the Constitution having once conferred the power upon the Legislature to prescribe the duties of this officer, with reference to the State's interest, in improvements
(62) already done and in process of completion, the whole subject matter is submitted to the discretion of that body, and "therefore the Supreme Court is not capable of controlling the *exercise* of power on the part of the General Assembly." *Broadnax* vs. *Groom*, 64 N. C., 250.

III. That having this *power* to give the appointment of State directors, &c., to Superintendent of public works, the General Assembly could withdraw such right and confer it upon another, as they had done in the Act of 1869–'70, chap. 112, giving to the Governor and counsel, and that by virtue of the same power, by the Act of 1870–'71, they took this authority

from the Governor and conferred it upon the President of the Senate and Speaker of the House.

IV. That this view is in harmony with sec. 10, Art. 3. That this section was not intended to apply to the manner of appointing proxies and directors, but only to those who have been recognized as officers, a proper classification of whom had been given by the Court in *Worthy* v. *Barret*, 63 N. C. R., and this Act of April 5th, 1871, empowering the President of the Senate and Speaker of the House to appoint, did not create any office at all, but if the right to appoint directors, &c., was an office it was created by the charter of the corporation, A. & N. C. R. R. Company, which existed at the adoption of the Constitution.

V. That the provisions of sec. 10, Art. 3, does not apply because this office (if one) had already been provided for prior to the Constitution and was therefore *otherwise* provided for, and that said 10th section does not, for the reason stated, apply to the Act of April 6th, 1871, under which the plaintiffs claim their appointments.

Phillips & Merrimon for defendants.

PEARSON, C. J. "The Governor shall nominate, and by and with the advice and consent of a majority of the
(63) Senators elect, appoint all officers whose offices are established by this Constitution, which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly."—Art. iii, sec. 10, of the Constitution.

The words—"whose appointments are not otherwise provided for,"—evidently mean: provided for by the Constitution, and the words: "No such officer shall be appointed or elected by the General Assembly," are superadded as an express veto upon the power of the General Assembly, to appoint or to elect an officer, whether the office is established by the Constitution or shall be created by an act of the General Assembly.

The construction was not contested on the argument, and the case was put by the counsel of the plaintiffs on the ground that the Act of April, 1871, which authorizes the President of the Senate and the Speaker of the House of Representatives to appoint proxies and directors for the state in all corporations in which the State is a stockholder, does not create an office.

On the part of the defendants, it was insisted; That the Act of April, 1871, does create an office, and that the General Assembly appointed officers to fill this new office in violation of art. iii, sec. 10, of the Constitution.

A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This, we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State.

Public officers are usually required to take an oath, and usually a salary or fees are annexed to the office, in which case it is an office "coupled with an interest." But the oath and the salary or fees, are mere incidents, and constitute no part of the office: Where no salary or fees are annexed to the office, it is a naked office—honorary,—and is supposed to be accepted, merely for the public good. The defi-
(64) nition also excludes the idea, that a public office must have continuance. It can make no difference, whether there be but one act, or a series of acts to be done—whether the office expires as soon as the one act is done, or is to be held for years or during good behavior. This incident, however, need not be considered, for here is continuance: the duty is imposed upon the President of the Senate, and the Speaker of the House of Representatives, for all time to come.

To illustrate our definition: The Executive Department is an agency for the State, and the Governor and others, whose duty it is to discharge this agency, are public officers.

The Judicial Department is an agency for the State, and the Judges are public officers.

The Legislative Department is an agency for the State, and the members of the Senate and of the House of Representatives, are public officers.

If it be objected, *Worthy* v. *Barrett*, 63 N. C, 199 speaks of members of Congress and members of the General Assembly as not being public officers, the reply is: The language used in that case has reference to the wording of the 14th article of the Amendments to the Constitution of the United States, in which the "Senators and Representatives in Congress and members of the State Legislatures" are nominated, because of being prominent objects—easily pointed out by specific terms; but in regard to the other objects, they could not be

pointed out, or nominated by terms to specific, and recourse was had to the more general term, "executive and judicial officers," so the inference that "members of Congress and members of the General Assembly" are excluded from the original and broad sense of "public officers" is by no means logical. But suppose, in some way, either in that above indicated, or by inadvertence in cases not calling for a precise definition: "Members of Congress and members of the General Assembly" have been taken out of the definition of "public officers," and are to be styled "public ser-
(65) vants." A distinction without a difference, that does not affect an argument, and we may allow this anomalous exception without at all impairing the force of the conclusion drawn from the legal meaning of a "public officer." The distinction between *Worthy* v. *Barrett* is this: here, we are treating the terms "public offices and officers," in the broad, original legal sense in which these terms are used in the Constitution of the state. There we were treating the terms in the restricted sense, in which they are used in the 14th article of the Amendments of the Constitution of the United States.

The instances given are offices coupled with an interest. The management of the University is an agency for the State, and the Trustees upon whom is imposed the duty of discharging this agency, are public officers, This office is naked and merely honorary.

Suppose it be enacted by the General Assembly: "There shall be some fit person, whose duty it shall be, to see, that all persons against whom there is probable cause for the charge of felony, are forthwith arrested, and in case any person shall flee from justice, to offer a reward for his apprehension."

SEC, 2. It is further enacted "that John Smith discharge the duties aforesaid." This is an agency for the State; a public office; it makes no difference whether it be styled "office of General of Police," or has no name, or whether there be an oath or not, it is to all intents and purposes a public office. The constitutionality of the act might be questioned, because to make this new office, a duty or function of the Executive Department is taken away; in other words, the material out of which this new office is manufactured is taken from the Governor; and in the second place, because the General Assembly has filled this new office by its own appointment, contrary to the express provision of the

Constitution—"no such officer shall be appointed or elected by the Generol Assembly."

Again:—suppose an act:—Whereas, experience has proved that the Governor has made ill use of the power of appointment, it is enacted: there shall be two fit persons to be
(66) styled "appointers general," whose duty it shall be to appoint all public officers and to fill all vacancies.

SEC. 2. It is further enacted,—"the President of the Senate and the Speaker of the House of Representatives, shall be the appointers general." This act is clearly unconstitutional; for, in the first place, in order to create this new office, it takes from the Governor, a duty or function vested in him by the Constitution; and in the second place, the General Assembly fills the office by its own appointment, contrary to the express veto of that instrument.

This is the case under consideration. True, it is on a larger scale and covers more ground; but although differing in degrec it is the same in principle. A new office is created; it is not so in name, but is in effect the office of "appointors for officers in all corporations in which the State is a stockholder," and in order to create the office a duty or function of his office is taken from the Executive, and the appointment of these "appointors for corporations" is made by the General Assembly.

If it be said, there is this distinction: The "appointors general" in the supposed act, are to appoint all State officers, whereas, the "appointors for corporations" are confined to State proxies and directors, and these are not officers of the State, but of a corporation in which the State is a stockholder. The reply is: This is a distinction without a difference,—even should it be conceded, that the proxies and directors are not public officers—into which question we will not enter, for our concern is with the office of "appointers for corporations" and not with the person they may appoint to these offices. To the suggestion, the Act of April 1871, does not purport to create an office or to fill it, the reply is: such obviously, is the legal effect of the act. When analyzed, it will be found to contain two provisions: there shall be an agency for the State to make the appointment of all State proxies and State directors in corporations. This creates a
(67) public office, and it can make no difference that it is called the office of appointers of State officers for corporations, or has no name given to it; in the second place,

the officers who are to discharge this duty are appointed by the General Assembly.

We declare our opinion to be, that the statute is unconstitutional, and that the relators are not entitled to the offices claimed. We put our opinion upon familiar principles and plain analogies of the law which are intelligible to every one. The many cases cited on the learned argument with which we were favored, are not referred to, because a full discussion of them would tend rather to obscure than to elucidate the subject.

We will only refer to *Hoke* v. *Henderson*, 4 Devereux 12; that mine from which so much rich ore has been dug. In the able and elaborate opinion of Chief Justice Ruffin, we find an instance of a public officer clearly in point, which fully confirms our conclusions. It sustains the distinction between a naked honorary office like the one which we have been discussing and an office coupled with an interest. It sustains our conclusion, that the duty of *appointing to an office, constitutes of itself* a public officer, and there is the further coincidence of indefinite continuance by conferring the new office upon the incumbents of offices already established. On page 21 he says: "The distinction in principle between agencies of the two kinds is obvious, the one is for the public use exclusively, often neither lucrative nor honorary, but onerous. The other is for the public service conjointly with a benefit to the officers. The distinction which I an endeavoring to express, may be fully exemplified by the difference between the public agency in appointing, and that exercised in discharging the duties of a Clerk. By the law the Judges of the Superior Courts, and the Justices of the County Courts were authorized to appoint the Clerks of their respective Courts; that power is *an office* in the extended sense of that word, which originally signifies duty generally, but it is not a lucrative or valuable office; it was a duty to be per-
(68) formed exclusively for the public convenience, and with reference to it alone, without any benefit immediate or remote to the Judges or Justices as individuals. "The Courts in this respect are not exercising a *Judicial* function, not serving for emoluments, but were mere ministers of the law, and naked agents of the body politic, to effect an end purely public." "But when the country has through those agents appointed a Clerk, though he is also a servant

of the public, yet he is something more than a naked, uninterested political agent."

2. Another ground was taken for the defendants: It is the one on which his Honor in the Court below put his opinion. But the Act of 24th of March, 1870, the Governor is authorized to appoint proxies and directors for the State in corporations in which the State was a stockholder, prior to the adoption of the present Constitution. This act was assented to, as an amendment of the charter by the corporators of the Atlantic & N. C. Railroad Company, at a general meeting in June, 1870; and it is insisted that the Act of April, 1871, which authorizes the President of the Senate and the Speaker of the House of Representatives, to appoint proxies and directors for the State, in all corporations in which the State is a stockholder, and repeals all laws in conflict therewith, and forbids the Governor to make such appointments, is unconstitutional in this: It violates the charter of the company, and varies the contract without the assent of the corporators. Reply: It may be the company has a right to complain of this change in the charter, but it is an act of the State, and as both the defendants and the plaintiffs profess to be acting under the authority of the State, neither can be heard to make the objection. Rejoinder: The defendants' title is not involved; the title of the relators is alone in question; and they cannot make a good title under an act which involves the charter of the company. Surrejoinder: By article VIII, section 1 of the Constitution: "corporations may be
(69) formed under general laws," &c.;—"all general laws and special acts passed pursuant to this section may be altered from time to time, or repealed;"—true, this does not apply to corporations chartered before the adoption of the Constitution, but the Atlantic and North Carolina Railroad Company by accepting the amendment of their charter by act of March, 1870, placed itself, in that respect, upon the footing of a corporation chartered after the adoption of the Constitution; and the power of the General Assembly to alter the charter from time to time, or to repeal the amendments, attaches to this corporation.

This is an interesting question, into which we will not enter, as its determination is not necessary for the purpose of our decision, and in regard to it, the corporation has not been heard.

The judgment of the Court below is affirmed with costs.

(70) RUFUS BOBBITT *v.* THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

1. The application for a policy of insurance, forms a part of the contract of insurance where the policy refers to it as such.
2. And in an action by the insured on such a policy, the burden of proof is upon the plaintiff.
3. The application must be set out in the complaint, and, being in the nature of a condition precedent, the truth of its representations must be proved by him.
4. A representation as to the value of property insured, is material, even though the policy contains a stipulation to pay two thirds of the real value or less if the loss were not so much; but the doctrine of immaterially does not apply in such a case, the representation forming a part of the contract, and, being made in response to a direct question.
5. A charge in such a case, that the application was not a part of the contract, that the declaration as to value by the insured was a *mere representation*, and that the only question for the consideration of the jury was the value of the property burnt, is erroneous, and the error is not cured by the remark afterwards made to the jury that unless such statements were fraudulent and false, they would not bar the plaintiff's right to recover.
6. Even treating the statement as to the value as a representation; it is not a correct principle, that to prevent a recovery, it is necessary to show that the statement was *fraudulent* as well as false, and herein lies the difference between a representation as *an opinion* and a representation of *a fact*.
7. It is sufficient to avoid the policy that the representations were false *however honestly made*—if material they must be *perfectly true*.
8. One whose property is insured at his own request in the name of another being his agent, has an insurable interest.

This was a civil action, tried before His Honor, Judge Watts, at July Special Term 1871, of Granville Superior Court.

The action was brought upon a policy of insurance
(71) issued by the defendant at the instance of plaintiff, to and in the name of one Newnan, against the loss of certain tobacco, &c., by fire.

The policy was based upon the application. The application is in the usual form, and contains a series of questions propounded to Newnan, and his answers thereto, amongst others, the following:

Q. What is the present cash value of the property on which insurance is wanted?

A. The present cash value of the tobacco on hand is $30,000 and it will be increased to $50,000. The average value on hand, say $30,000.

There were printed on the back of the policy, not signed, a number of statements under the heading, "the conditions

and stipulations referred to in this policy," amongst which is this:

"1. The basis of this contract is the application of the insured, and if such application does not truly describe the property, this policy shall be null and void."

The policy reads thus:

"This policy of insurance witnesseth, that Dennis P. Newnan having paid to the London and Liverpool and Globe Insurance Company, the sum of five hundred dollars, for insurance for loss or damage by fire, (subject to the conditions and stipulations endorsed hereon, which constitute the basis of this insurance,)

* * * * * * * * * * *

do hereby agree that from ------ until ------ the funds and property of said company shall (subject to the conditions and stipulations endorsed hereon, which constitute the basis of this insurance) be subject and liable to pay, reinstate or make good to the said assured, their heirs, executors or administrators, such loss or damage as shall be occasioned by fire to the property above mentioned, and hereby insured, not
(72) exceeding in each case, respectively, the sum or sums hereinbefore severally specified," &c., &c.

The answer alleged that the representations of Newnan were in several respects false and fraudulent, and insisted that Newnan, who was plaintiff's bailee, had no insurable interest. On the trial it appeared that the policy was obtained in the name of Newnan, but for plaintiff's benefit, though plaintiff's name does not appear in the policy, and that Newnan had assigned this policy to plaintiff. There was also evidence tending to show that the representations contained in the application as to the value of the tobacco were false and also fraudulent. The defendant insisted that the application and the endorsed memoranda, headed "creditors, &c.," formed a part of the contract of insurance and warranty and if false the plaintiff could not recover, and applying that principle to the evidence, that if the jury believed from the evidence that the cash value of the tobacco in the plaintiff's factory at the time of making the application was greatly less than thirty thousand dollars, the plaintiff would not be entitled to recover.

His Honor declined these instructions and charged the jury: "That if they believed from the evidence that the plaintiff had *twenty** thousand dollars worth of tobacco in the

*NOTE.—Perhaps a misprision for "thirty?"

factory at the time of the fire, and he sustained loss to that amount by reason of the fire, that he is entitled to recover twenty thousand dollars.

"That the application was a representation and forms no part of the contract.

"That the application was not embodied in the policy and is no part of the same.

"That the only question for the jury to consider is the amount of the tobacco in the factory at the time of the burning.

"*That Newnan did have an insurable interest.*

"That the statements in the application were merely
(73) representations, and unless they were fraudulent and false they would bar the plaintiff's right of recovery."

Many other interesting questions are presented by the voluminous transcript, but as the decision is based upon the two points developed by this report, it is deemed best not to anticipate, as from all appearances our case will again appear in this Court in a new garb.

There was a verdict and judgment for the plaintiff for $20,000, and the defendant appealed.

Lanier for the appellant.

1 The defendant was entitled to the instruction prayed, to the effect that the application was a part of the contract.

Parson's Laws of Business, 364, 402, 410, 411, 412.

Am. Com. Law, 359, 360, 361, 362.

As to the difference between mere statements and representations forming part of the contract, see Parson's L. B., 410, 411.

2. The Court ought to have given the other instructions, because, the affirmative statement of the owner, in the application, as to the cash value of the stock of tobacco is a warranty, and operates as a condition precedent.

Parson's L. B., 372, 402, 410, 411, 412

Parson's Merc. Law, 499, note 1.

3 Kent, 282, 283, 288.

Whitehurst v. *N. C. M. Co.*, 7 Jones, 433.

Boyle v. *Ins. Co.*, *Ib.* 373, (note by the terms of the policy any misrepresentation or concealment avoids the policy.) If a warranty, then being broken, though innocently, it avoids the policy whether material or not.

Parson's L. B., 410, 412.
3 Kent, 382, 383, 388.
Parson's Mer. Law, 519 to 521 inclusive.
(74) Am. Com. Law, 364, 365, 366.
Hazzard v. *N. E. Ins. Co.*, 8 Peters, 579.
Marshall on Insurance, 341, 451.
Rich v. *Parker*, 7 T. R., 705.
Ellis on Insurance, 81, 82.

If not a warranty strictly at all events, it was a part of the contract, and if material *in the mind of the underwriter* and false, it avoids the policy.

3 Kent, 283.
Parson's L. B., 411, 412.

That it is part of the contract, appears from the fact, that the application is referred to, in the policy as the basis of it, and is signed by the party, and that the terms of the policy make a misrepresentation avoid it.

That it was material in the mind of the underwriter, is shown by the question being asked in the application.

Parson's L. B., 476, 413.
Am. Com. Law, 364.
Parson's Mer. Law, 534.

3. The Court erred in every instruction that was given, not only because they were contrary to law, but also because they substantially expressed to the jury an opinion as to the facts, namely, that the plaintiff had established by proof everything necessary to entitle him to recover something, and the only thing left for the jury to determine, was the measure of damages!

As to the last instruction, even if it were law, it was wrong, because in the other instructions, the Court had already intimated an opinion in substance, that the statements in the application were not fraudulent and false, or not material if they were; and because from the whole charge, the jury must have understood the Court to mean, that they must have been fraudulent in intention to bar a recovery.

Phillips & Merrimon for the appellee:

(75) I. "Application" contains *representations*, and not *warranties*. *Campbell* v. *Ins. Co.*, 98 Mars., 381: "*basis.*"

II. Burden of proving them false, devolves upon defendants.

III. All matters showing contract void for fraud, must be specially pleaded. *Price* v. *Ins. Co.*, 19 La. An., 214.

IV. Pleading must show that a representation relied on as false, was also *material; i. e.*. materiality is matter of fact for jury. *Ins. Co.* v. *Southard*, 8 B., Mon., 634.

V. Presumption always that a statement is a *representation*, and not a *warranty*. *Ibid*, Fland., 223, and *Wall* v. *Howard Ins. Co.*, 14 Bard., 383.

VI. By the first condition, which is part of the *contract*, the description of the property must be *true*. It is described as in the factory. There was evidence that the agent of the defendant, knew that the greater part was in a *barn*, and was to be removed into the factory shortly afterwards. In such case the misdescription does not hurt. Steph. N. P., 3d, 2082; *Franklin* v. *Ins. Co.*, 42 Mo., 456; *Anson* v. *do.*, 23 Iowa, 84; *Lee* v. *Addit*, 37 N. Y., 78; *Combs* v. *do.*, 43 do, 148; *Bartholomew* v. *do.*, 25 Iowa, 507; *Rowley* v. *Ins. Co.*, 36 N. Y., 450; *Ayers* v. *do.*, 21 Iowa, 185; Flanders, 180, &c., and 100. See *Plumb* v. *Ins. Co.*, 18 N. Y., 392, and see *Tibbetts* v. *Inv.* v. *Co.*, 3 Allen, 559

VII. That plaintiff had no insurable interest must be alleged in answer to make defence admissible *Forbes* v. *Ins. Co.*, 19 Gray, 249.

W. A. Graham, Moore & Gatling, L. C. Edwards followed on the same side:

READE, J. The plaintiff made a written application to the defendant to insure his property, in which application he undertook to describe the property, its character, quantity, value and situation. In consequence of that applica-
(76) tion and the payment of $500, the defendant agreed to insure the property for twelve months against fire, or to pay $20,000 if the property should be burned if the loss should be so much, or else as much as the loss should be, and gave the plaintiff a policy to that effect.

The application was a printed form furnished by the defendant with questions to be answered, and with blanks for the answers, and the blanks were filled up in writing by the plaintiff and signed by him. There was a printed heading to the application, setting forth that, "the estimated value of personal property, and of each building to be insured, and the sum to be insured on each must be stated separately. When personal property is situated in two or more build-

ings, the value and amount to be insured in each must be stated separately, three-fourths only of the value to be insured, &c."

The application described the property insured as, "raw and manufactured tobacco in a two-story framed building, &c." And in answer to question 8, of the form, "what is the present cash value of the property on which insurance is wanted?" the response is, "the present cash value of the tobacco on hand is $30,000, and it will be increased to $50,000, the average value on hand say $30,000" And the application concludes in print as follows: "And the said applicant hereby covenants and agrees to, and with said company that the foregoing is a just, full and true exposition of all the circumstances with regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk."

Upon that application the defendant issued to the plaintiff a $20,000 policy, in which it is expressed to be "subject to the conditions and stipulations endorsed on the back of the policy, which constitute the basis of this insurance."

One of the aforesaid conditions and stipulations on the back of the policy is as follows:

"1. That the basis of this contract is the application
(77) of the insured, and if such application does not truly describe the property, this policy shall be null and void."

The first question for our consideration is, what is the nature and effect of that application? Is it a part of the contract, and in the nature of a warranty or condition precedent that the property was as decribed, or is it a representation preliminary to and outside of the contract?

It may be premised that insurance contracts are in general, subject to the same rules of construction as other contracts. And it is a familiar rule that where there are several separate writings all about the same matter, between the same parties, referring to each other and all necessary to complete the whole, they are all to be read together as if they were all one. Apply that rule to the case before us. The application asks for the policy, and describes the property, and covenants for the verity of the description. The policy is issued as asked for in the application, and refers to another writing on the back of the policy for the "conditions and stipulations subject to which it is issued." And that writing

refers back to the application, upon the verity of which the policy is to be valid or null and void. Take away either of these writings, and the contract would be incomplete, and the right of the parties could not be declared. Read them together, and the contract amounts to this:

The plaintiff proposed to the defendant to insure him $20,000 on property, the "present cash value of which was $30,000," and to continue on an average about that value for twelve months, and that the property was at that time and would continue to be in a certain two-story framed building which was described. And the defendant agreed that if the plaintiff would give him $500, he would make the insurance, and would pay him $20,000 in case of fire if he should lose so much, or such less sum as the loss might be: with the understanding that the property was as described, and should continue so to be, else he was to pay nothing at all.

(78) This view of the case will be found to be abundantly supported by Parsons on Contracts, Parsons on Marine Insurance, and Archbold's *Nisi Prius*, title Insurance, and the adjudged cases cited by them. It is sufficient to quote the following from Archbold:

"Modern policies of insurance usually contain a number of conditions, stipulations, warranties, etc., either in the body of the instrument or endorsed upon it Frequently, the policy refers to certain printed proposals of the company as containing the terms of the contract; and in such cases such printed proposals must be deemed a part of the policy, even although they be without stamp, or seal, or signature."

The application being, therefore, a part of the contract, an important enquiry was, whether the property was correctly described in the application. And the first question is upon whom was the burden of proof? The burden of proof is upon the plaintiff. It would be otherwise if the application were not a part of the contract, but was a mere representation.

Being a part of the contract it was necessary for the plaintiff to set it out in his complaint; and it being in the nature of a warranty or condition precedent, it was necessary that the plaintiff should prove it. Archbold says; "Where conditions are endorsed upon the policy or contained in certain proposals referred to in the policy, they must be set out in the declaration, and there must be an averment showing

that the plaintiff has observed them. And where a compliance with them is in the nature of a condition precedent to the plaintiff's right to recover, a strict compliance must be observed." And again: "If an averment of compliance with any of the conditions endorsed on the policy, or contained in any of the proposals of the company referred to in the policy, be traversed, then, if the traverse be in the negative, the plaintiff must prove the averment; but if the averment be in the negative and the traverse be in the affirmative, the defendant must prove his traverse. And if any of these be a condition precedent to the plaintiff's right to re-
(79) cover, the compliance with it must strictly averred and as strictly proved."

The complaint in this case, Art. VI, does aver that the plaintiff had "fulfilled all the conditions of the insurance," but it does not set out the conditions embraced in the application, under the idea we suppose that they were not a part of the contract. This defect may be remedied by an amendment at the discretion of the Judge below, when the case goes back if the plaintiff choose to move. The defendant's traverse is also general. But considering the complaint to contain all the necessary averments, and the defendant's traverse to be in the negative—which is the most favorable view for the plaintiff, because as we have seen it is necessary that the complaint should contain them—then the burden of proof is upon the plaintiff; and he must show that the cash value of the property at the time of the application, or at least at the time the policy issued was $30,000, and that it continued to be about that up to and at the time of the fire.

It was much insisted on in the argument here, that even if the description of the property was false, yet it was *immaterial*, and therefore did not interfere with the plaintiff's right to recover. But the doctrine of immateriality does not apply when the representation is a part of the contract, and especially when it is in reply to a direct question. "Where the representation is no part of the contract, it vitiates the policy as being a fraud merely; and therefore if it be immaterial or be substantially complied with, it will not affect the validity of the policy." But if the description of the property were not a part of the contract, but were a mere representation, still it is a great mistake to say that it is immaterial. It was said to be immaterial because the policy com-

pels the defendant not to pay $20,000, but only so much as should be lost by the fire, and therefore the less property on hand to be burned, the less risk for the defendant and the better for him. If that were so it would be difficult to account for the provision in the policy that the defend-
(80) ant would not insure for more than three-fourths of the value of the property on hand The reason for this limitation is, plainly, to make it to the interest of the plaintiff to take care of the property, and to prevent the dangerous temptation to destroy it for gain. No one can suppose that the defendant would have insured the plaintiff $20,000 if he had supposed that the property was only worth $20,000, or probably not half so much.

From what we have said, it will appear what were the errors on the trial below, without noticing the defendant's many exceptions, *seriatim* His Honor informed the jury that the application was not a part of the contract; that it was a mere representation, and the only enquiry for them was the value of the tobacco burned. And he very emphatically excluded everything else from their consideration. All this was error.

It is said however, that a subsequent part of the charge cures these errors. His Honor closed his charge by saying, "The statements in the application were mere representations, and unless they were fraudulent and false, they would not bar the plaintiff's right to recover." If this were so in theory, still it would be dangerous to allow a verdict to stand where there is so much probability that the jury were misled. After he had emphatically told them that the only enquiry was, how much tobacco was burned, what did they care for "mere representations," which were "no part of the contract." But it was not right in theory. Let it be supposed that the statement of the value of the tobacco was a mere representation —a representation of a *fact*—and that representation was *false*, but not *fraudulent*, and misled the defendant in a material matter; the plaintiff could not recover. A representation as an *opinion*, must be not only false but fraudulent; but not so with the representation of a *fact* as distinguished from an *opinion*. The principle is very well stated by Archbold:

"As the unwriter calculates his risk by what is told to him by the insured at the time of effecting the insurance, the law exacts from the assured, not only that he state all he
(81) knows material to the risk, but that what he states

shall be perfectly true—insurance being a contract in which the utmost good faith is required to be observed on the part of the assured, and if upon effecting an insurance, any representation is made to the underwriter, which is material, and if true, would lesson the risk, if such representation turn out to be false, it will have the effect of vitiating the policy. And it matters little to him whether the party making the representation knows it at the time to be false, or does not know whether it is false or true, or believes it to be true from the representations of others," &c. So that His Honor erred in telling the jury, that the representations must be "false and fraudulent." It was sufficient to avoid the policy if they were false, however honestly made; because it was the representation of a fact calculated to mislead, and not an expression of opinion or belief.

When the case is tried again, the application, the policy and the conditions and stipulations must all be considered as one instrument, as containing the contract. And the plaintiff must aver and prove compliance with all his part of the contract.

If the plaintiff recover, he is entitled to the value of the property burned, which was embraced in the policy, not exceeding $20,000. The value of the tobacco, was what it was worth then and there—what it would have sold for then and there, or what it would have netted the plaintiff in the usual markets, after paying stamp duty and all other usual and necessary expenses.

We do not sustain the defendant's exception, that the plaintiff had no insurable interest.

THERE IS ERROR. *Venire de novo.*

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(82) MARY N. WOODBOURNE *vs.* RALPH GORREL and others.

1. By section 9, chapter 37, of the Revised Statutes, "all conveyances in writing by husband and wife for any lands personally acknowledged before a judge, &c., the wife being privily examined, &c., shall be as valid to convey the wife's estate in such lands as she may have, whether in fee simple or otherwise, as if it were done by fine and recovery, and if a commissioner be appointed under section 10 of said Act, to take such acknowledgment, privy examination," &c., "it shall be as effectual as if personally acknowledged before the Judge or County Court." Revised Statutes, sections 9 and 10, chapter 37.

2. Fines and recoveries are matters of record in the Court of Common Pleas in England, and cannot be impeached collaterally in an action

of ejectment, or vacated, nor set aside, without some direct proceeding instituted for that purpose.

3. In this State the acknowledgment and examination of a married woman before a judge or county court, as the law was in 1833, has the force of, and is in fact, a record. She cannot be heard to impeach the truth of the record or vacate the same; although the examination was not separate and apart from her husband, and she was subject to the influence of his presence, and although she was not of sound mind and could not "voluntarily assent thereto."

4. Possibly: When the examination is taken by a commissioner, a married woman may maintain a bill in equity, to cancel the deed on the ground of fraud, and a false certificate by the commissioners. Yet this *assurance of title*, and conveyance of record cannot be impeached collaterally in an action to recover the land.

5. This proceeding and record is not a mere deed, so far as a married woman is concerned, but is "an assurance of title by record." It is not a mere probate for the sake of registration, but is a "*fine*," and puts an end to the matter.

This wae an action to recover a tract of land in Guilford county, containing nineteen acres, tried before Tourgee, Judge, at Fall Term, 1871, of Guilford Superior Court.

Both parties claimed under one Mebane. Plaintiff was a daughter of said Mebane, and in the partition of his lands among his children, this portion was allotted to her. Plaintiff intermarried with Woodbourne in 1818, who died (83) in 1867. To connect the defendants with David Mebane, father of plaintiff, plaintiff produced a copy of a registered deed, purporting to be executed by herself and Allen Woodbourne, her husband, dated in May, 1823, and conveying the land to one Humphreys, and a deed from Humphreys to Morehead, and from Morehead to the other defendants. The registered deed had at the foot an order of the Court at the May Term, 1823, with a certificate of two justices. A copy of which is set out in the case sent to the Supreme Court, but it is not deemed material, as the opinion of the Court is based upon a subsequent action of the County Court in reference to the probate of this deed, viz: at May Term, 1833, of the County Court of Guilford, "the execution of the deed was proved by John M. Dick, and upon proof of the inability of the plaintiff to attend Court to acknowledge the same, a commission was duly issued, and the privy examination taken, returned and recorded according to law."

The plaintiff offered to prove that at the time of her examination was taken under the commission issued from May Term 1833, she had no recollection thereof, and to show that she was then in a state of mind too feeble to do any intelligent

act. On objection, this evidence was excluded by the Court. The plaintiff asked the Court to charge the jury that the deed recorded at May Term 1823, was valid as to Allen Woodbourne, but void as to her. That the proceedings *had* at May Term, 1833, did not cure the defect, and said deed was ineffectual to pass plaintiff's title. The Judge refused to so charge, but told them that the deed, as recorded either in 1823 or in 1833, was effectual to pass plaintiff's title.

Verdict and judgment for defendants.

Appeal prayed and granted.

Plaintiff assigned as errors:

I. Exclusion of the evidence offered as to the execution and acknowledgement of the deed at May Term 1823, beyond the verge of the Court, and in a private house, and that
(84) the same was done under threats and fear of her husband.

II. In exclusion of plaintiff and other witnesses, to show plaintiff's incompetency to acknoweldge the execution of said deed in 1833, before the commissioners.

III. In the refusal to give the charge asked for and giving the charge which was given.

Bragg & Strong, Scott & Scott, Dilliard & Gilmer, for plaintiff.
W. A. Graham, for defendants.

PEARSON, C. J. Many interesting questions were presented and argued by the learned counsel, on both sides in reference to the examination and probate, in 1823. We will not enter into them, for in our opinion, the title of the plaintiff passed beyond all question, by the proceedings had in 1833. So, what we might say in regard to the proceedings in 1823, would be *obiter*, which the profession will do this Court the justice to say, has at all times been avoided; however much it cut off an opportunity for a useless display of labor and learning.

The validity of the conveyance under which the defendants make title depends upon the Rev. Statutes. ch. 37, sec. 9–10. Act 1751, sec. 9 enacts, "all conveyances, &c., acknowledged, &c," shall be as *valid in law, to convey all the estate of the wife, in such lands, whether in fee-simple, righl of dower, or other estate, as if done by fine and recovery*, or any other ways and means whatsoever. Sec. 10 enacts, that when it shall be represented to the Judge or County Court, that the wife is so aged or

infirm, that she cannot travel to the Judge or County Court, it shall be lawful for the Judge or County Court to have a commission issued to two or more, for receiving the acknowledgment of the wife, and "*such deed acknowledged before them, after they have examined her privily and apart from her*
(85) *husband*, touching her consent, and certified by the County Court to which the commission shall be returnable, shall by order of the County Court be registered with the commission and returns, and *shall be as effectual as if personally acknowledged, before the Judge or County Court, by such feme covert.*"

In our case, the examination of the *feme covert*, was taken by commissioners; by the section last cited, the return of the commissioners accepted by the County Court and ordered to be registered with the commission and return, is made as effectual as if personally acknowledged before the Judge or County Court, and by the previous section the acknowledgement before the Judge, makes the conveyance "as valid in law to convey all the estate, *as if done by fine and recovery*," so we are to enquire what was the effect of a fine and recovery according to the common law,—that will decide the question of the admissibility of the evidence, the rejection of which is the error, set out in the bill of exceptions.

2 *Blackstone's Com.*, 348; a fine, is an assurance of record, "sometimes said to be a feoffment of record, though it might with more accuracy, be called an acknowledgment of a feoffment on record." But more particularly a fine may be described to be amicable composition or agreement of a suit by leave of the king or his justices, "whereby the lands in question become or are acknowledged to be, the right of one of the parties." The party to whom the land is to be conveyed or assured, commences an action or suit at law, by suing out a writ or *precipe*, called a writ of covenant, and the suit is compromised, and the terms entered on the record; by 27 *Edw.* 1—the note of the fine shall be openly read in the Court of Common Pleas. "This is amost the only Act that a *feme covert* is permitted by law to do, (and that because she is privily examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband): it is therefore the usual and almost the only safe method where-
(86) by she can join in the sale of any estate in *ib.* 55 A recovery, is like a fine, a suit in the Court of Common Pleas, and the difference is that, instead of a compromise

entered of record, there is a judgment entered in favor of the demandant" *ib* 357. This reference to the common learning in regard to fines and recoveries is made, because the counsel for the plaintiff, in his learned and earnest argument, did not advert to the fact that the Revised Statutes, Act of 1751, gives to the acknowledgment of a deed by husband and wife, before a judge of the County Court, (the wife being privily examined,) the force and effect of a fine and recovery. Fines and recoveries are matters of record in the Court of Common Pleas—it follows, that the acknowledgment and privy examination of a married woman before a judge or County Court as required by the statute, has the force of, and is in fact a record. Suppose the record of the Court of Common Pleas in England, sets out a fine duly levied by husband and wife, was it ever heard of, that the wife could afterwards impeach the verity of the record, and be allowed to aver, (not in a direct proceeding to vacate and set aside the fine, but in an action of ejectment, when the fine is offered in evidence as a conveyance of her title,) that the record was untrue, in this, that she was not examined separate and apart from her husband, (as is held in one of the cases cited by the learned counsel) or in this, that she did not acknowledge that she had executed the deed voluntarily and without compulsion, for that "she had no recollection thereof," and could prove that she was then "in a state of mind too feeble to do any intelligent act?" which is our case. Suppose the record of the County Court had set out the fact that Allen Woodbourne and his wife, Mary N. Woodbourne, at May Term, 1833, appeared in *open Court* and *acknowledged* the execution of the deed, and thereupon she was examined by the Court, through one of its members in the verge of the Court, separate and apart from her husband, and acknowledged that she had executed the deed voluntarily and of her own ac-
(87) cord, without any compulsion or constraint on the part of her husband, whereupon it is ordered that the acknowledgment and examination be entered of record, and the deed together with a copy of the record, be registered, " could Mary N. Woodbourne be afterwards heard to impeach the verity of the record, collaterally, in an action for the land, when this 'assurance of record' was offered in evidence?" Surely not. But in our case, "the execution of the deed was proved in Court by John M. Dick, and upon proof of the inability of Mary N. Woodbourne (the wife) to attend Court, to

acknowledge the same, a commission was duly issued, and her privy examination taken, returned, and recorded according to law," in pursuance of sec. 10, Rev. Statute, ch 37.

The learned counsel could not deny that this proceeding was of the same force as if the acknowledgment had been in open Court, and yet the position taken by him shows that his vigorous mind was led astray by a seeming difference.

Perhaps, the legislation by which the form and solemnity required to levy a fine at the common law, is dispensed with, for the purpose of making a transfer of land by married women, easy and cheap, is unwise, for according to the common law, a fine could only be levied by acknowledgment in the Court of Common Pleas. By Statute 15, Edw. 2, "if any by age, impotence or casualty be witholden, that he cannot come to our Court, two, or one of the justices, by assent of the rest shall go to the party and receive his cognizance on the plea in which the fine ought to be levied, &c."

If there go but one, he shall take with him an abbot, prior knight, or man of good fame, and certify the Court thereof by the record; that all things incident to the fine being examined by him, it may be duly levied. 4 Comyn's Digest, title fine E. 6.—E. 7–1.

But whether this legislation be wise or unwise, we have this sequence: The deed being first acknowledged or proved in Court, on proof that the wife is unable to attend (88) Court, a commission may issue to take her privy examination and the return of the commissioner, received by the Court and recorded and registered, "*shall be as effectual as if personally acknowledged before the Judge or County Court by such feme covert.*"

1. The acknowledgment and privy examination taken before a Judge or by the County Court, *shall have the force and effect* of a fine and recovery."

2. A fine or recovery is a matter of record done before the *Chief-Justice, or puisne Justices of the Court of Common Pleas, in open Court and the verity of such record cannot be impeached.*

After reflection, I am not able to see how the proceeding, if done before a Judge or by the County Court, could be vacated by the wife, if, in point of fact, the examination was not separate and apart from her husband, and she was subject to the influence of his presence, or, if in point of fact, she was not of sound mind, and could not "voluntarily assent thereto." Possibly, when the examination is by commission, the

wife might maintain a bill in equity to cancel the deed, on the ground of fraud and a false certificate by the commissioners, but it is perfectly certain that this assurance of title, and conveyance of record, cannot be impeached collaterally in an action for the land as the plaintiff, offered to do in this case. There is no instance of the kind in our reports, nor has the novelty, ever before been suggested, within the recollection of any member of this Court, although some of us have been at the bar over forty years, and we have the traditions of the profession. We can only explain the cases cited by the learned counsel from Nevada, Texas and other States on the supposition, that in those States there is no statute, giving to this conveyance and "assurance of title," the force and effect of "a fine or recovery"—and the Judges felt at liberty to act upon their own notions, as "to the broad ground of truth and justice."

Mr. Dilliard took this position: The examination and probate are proceedings for the purpose of registra-
(89) tion, but the *factum of the deed* is open to proof on the trial; certain it is, said he, that the husband, as to whom the probate was made by a witness, can on trial, offer proof to the contrary, or prove that he executed the deed under duress—so the deed is void as to him, but valid as to the wife, which is an absurdity."

The reply is, if the deed be void as to the husband, it is void as to the wife, for a *feme covert* cannot execute a deed except jointly with the husband; but the fallacy of his reasoning, taking it in a broader sense, lies in this. If we can suppose it to be simply a deed in reference to the husband, yet certainly in regard to the wife, the proceeding is not a mere deed, but is a conveyance "an assurance of title by record," not done only for the purpose of registration, but done for the purpose of conveying and assuring the title. It is not a mere probate for the sake of registration, but is "a fine," and puts an end to the matter, so far as parties and privies are concerned, at common law, and if levied with proclamations, under the *Statute Hen.*, 7, it is binding and a bar to all strangers who do not make claim within five years after right of entry accrues.

THERE IS NO ERROR. Judgment affirmed.

(90) WILMINGTON, CHARLOTTE AND RUTHERFORD RAILROAD COMPANY *v.* WESTERN RAILROAD COMPANY.

The legal effect, of the exchange of bonds by the State and the W., C. & R. R. R. Co., and of the mortgage, authorized by the Acts of 1859 and 1861, was to vest the ownership of the bonds in the State, secured by the mortgage. The State had, therefore, a valuable interest in those bonds and mortgage, as a fund to dispose of, in aid of other works of internal improvement, subject to existing equities.

In transferring the bonds to the Western R. R. Co. in payment of the State's subscription, the General Assembly did not exceed its power. But the General Assembly had no power to subordinate these bonds to others, authorized to be issued by the Act of March 12th, 1870.

This was a motion for an order of injunction, heard before Russell, Judge, at Chambers in Wilmington, June 7th, 1871. The plaintiff filed a complaint stating in substance the various acts of the General Assembly in reference to itself. The opinion of the Court only renders it necessary to state the substance of certain acts bearing upon the matter in litigation, and certain facts connected therewith.

It is admitted that the defendant has in possession fifty bonds of $10,000 each, issued by the plaintiff and payable to bearer, and also detached coupons of fifty other bonds, issued by the plaintiff, amounting to some $200,000 These bonds were originally placed in the hands of the Treasurer, from whom defendant obtained them, under and by authority of two acts of the General Assembly, dated in February, 1859, and February, 1861. By these acts the Treasurer was authorized to deliver to the plaintiff a certain number of bonds with coupons attached, for which the plaintiff was to deposit a like number with the Treasurer; and it is further provided in said acts "that to secure the principal and interest of said bonds, issued by the Wilmington, Charlotte and Rutherford Railroad Company, the State of North Carolina shall,
(91) by this act, have a lien upon all the estate of said Company, both real and personal," Under these acts an exchange was made of two hundred bonds of $10,000 each. By the Act of 1866 and ordinance of the Convention, the plaintiff was authorized to borrow money, not exceeding $2.500,000 by the issue of bonds, and to secure the same, execute a mortgage, "conveying its franchise and property, including its road-bed, &c., &c., and the mortgage so executed, &c., shall have priority over any lien or claim held by the State," "and the State shall be in the position of a second mortgagee." Under an Act passed 25th February, 1867, the

Treasurer was directed to subscribe on behalf of the State, one million of dollars to the capital stock of the Western Railroad Company, the defendant, to be paid in second mortgage bonds of the Wilmington, Charlotte and Rutherford Railroad Company. In payment of this subscription the bonds in litigation were delivered to the defendant in the year 1867 or 1868. The act further provides that the bonds above referred to, shall be "subject to the same equities the State now has."

By an act of the General Assembly, ratified March 12th, 1870, the plaintiff was authorized to borrow money by an issue of bonds, not to exceed two millons five hundred thousand dollars, and execute a mortgage conveying its franchise, property, etc., which, when executed, shall have priority over any lien or claim held by the State in the property so conveyed.

The plaintiff alleges that the mortgage has been made and the company is endeavoring to negotiate the bonds secured by said mortgage, and that they are second mortgage bonds. The complaint further states, that the defendant is endeavoring to sell the bonds above referred to, representing *untruly* that they are second mortgage bonds and thereby interfering with the sale by the plaintiff of the second mortgage bonds, issued Act of 12th March, 1871, and asks that the defendant be enjoined from negotiating, transferring or in any way disposing of the bonds or detached coupons.

(92) Defendant claims that the State had a right to transfer these bonds in payment of her subscription; that they were so transferred; that they are held and claimed as second mortgage bonds and were delivered before the passage of the Act of 1870, and are not subject to any lien created by that act.

Upon application to Judge Russell, notice was issued to defendant to appear at Wilmington and show cause why an injunction should not issue. Defendant appeared, and the matter being heard, His Honor issued an order restraining the defendant from selling, transferring, etc., the said fifty bonds issued by plaintiff, and the detached coupons, etc. From which order the defendant appealed to the Supreme Court.

Strange, for plaintiff.
Battle & Sons, *J. C. McRae*, for defendant.

PEARSON, C. J. The fact that the State of North Carolina has been exceedingly liberal in its efforts to aid a general system of internal improvements, is admitted by all.

How far these efforts have been judicious, is a matter upon which it is not ours to decide. The question before us is confined to the parties in this action, and to the legal rights and equities growing out of the very complicated legislation in reference thereto. We can only remark from a general view of the subject, that while the State has failed to attain its purpose, the General Assembly is charged with an unwarranted exercise of power, at the instance of one of the parties to the prejudice of the other.

We do not concur in the view taken on the part of the plaintiff, to-wit: That the effect of the exchange of bonds, was simply to put the bonds of the Wilmington, Charlotte and Rutherford Railroad Company, into the possession of the State as a mere depository or pledgee, and consequently, that the General Assembly had no power to dispose of them, and the act transferring a portion of them, in payment for stock of the Western Railroad was without authority,
(93) *ultra vires* and void. Thus leaving it in the power of the General Assembly afterwards, by the Act of 1870, to subordinate these bonds, so attempted to be transferred in regard to the priority of the mortgage by which they were secured, to another set of bonds, which the plaintiff was by that act authorized to issue; and "so secure the payment of the same, by a mortgage which shall have priority *over any lien or claim of the State*," the idea being, that as the General Assembly had no power to dispose of these bonds and the mortgage by which they were secured, the transfer vested no title in the Western Railroad Company, and was a nullity, and of course the General Assembly, in 1870, had power to subordinate them by putting them on the footing of third mortgage bonds.

On the contrary, after a careful consideration of the many acts of the General Assembly, and of the ordinances bearing upon the question, we are of opinion that the legal effect of the exchange of bonds and of the mortgage, was to vest the ownership of the bonds in the State, secured by the mortgage.

Consequently the State had a valuable interest in their bonds and mortgage, as a fund which the General Assembly had power to dispose of in aid of any other work of internal improvement, or for any other purpose, subject of course, to

existing equities, and the General Assembly did not, in transferring a portion of these bonds to the defendant, exceed its power as owner of the fund or act in bad faith to the plaintiff, as the act making the transfer, especially provides "for the transfer of these bonds as second mortgage bonds of the Wilmington, Charlotte and Rutherford Railroad Company; now held by the State, and secured by a mortgage upon all estate, both real and personal, belonging to said company, *subject to the same equities the State now has*, ratified February, 1867; in other words the bonds and mortgage are transferred to the defendant, with the legal rights and equities of the State, and subject to the legal rights and equities of the plaintiff, existing at the time of the transfer, it follows that (94) the General Assembly had no power, by the Act of 1870, to subordinate the bonds which had thus been transferred to another set of bonds, which by the latter act, the plaintiff was authorized to issue.

Indeed the Act of 1870, by its proper construction, does not purport to do so, for it only provides that these last bonds "shall have priority *over any lein or claim of the State*," and does not attempt to give priority over the bonds and mortgage, which the State had before transferred to the defendant.

This disposes of the case, for the gravamen of the complaint is, "that the defendant is now endeavoring to sell the said bonds, *untruly representing* them to be second mortgage bonds, and is thereby interfering with the sale by the plaintiff of the second mortgage bonds, issued under the Act of 12th of March, 1870." Whereas, as we have seen, the defendant holds the bonds in question under a prior and valid transfer of the bonds and mortgage.

The question, whether these bonds in the hands of the defendant are subject to be redeemed by the plaintiff, under section 4, Act 1861, which provides that the plaintiff may at any time redeem from the Public Treasurer any number or portion of its bonds, "*the same then being the property of the State* by paying the par value thereof, or if the bonds of the State are below par, by paying therefor the same price as the State bonds command in the market" is not presented by the pleadings; there is no offer by the plaintiff to redeem the bonds—so it is a hypothetical case, which may never be presented, and the act under which the defendant derives title, especially provides that the transfer is made subject to all equities.

This is notice to all persons who may take title, from the defendant, derived under the Act 1867.

The plaintiff has no standing in Court upon that ground, nor are the provisions of this section set up as a ground for asking the interference of the Court.

Error. Order reversed. This will be certified.

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(95) A. A. McKEITHAN & SONS *v.* JOHN WALKER & W. J. BROWN.

1. Where a debtor executes a deed in trust to a trustee to secure certain debts therein mentioned, and after the registration of the deed, a creditor obtains judgment and has the same duly docketed; the judgment under the provisions of C. C. P., Sec. 254–503, is a lien upon the equitable estate of the debtor.
2. The lien thus acquired cannot be enforced by a sale under execution. In order to sell an equitable estate, not liable to sale under execution, the plaintiff in the execution must resort to his action (as formerly, to bill in equity,) to ascertain the rights of all parties interested, and to enforce his lien.
3. The purpose of the Code of C. P., Sections 264–266, was to give a remedy by "Proceedings Supplemental to Execution," to a plaintiff only in case the defendant had no known property liable to execution, or to what is in the nature of execution, proceedings to enforce a sale to satisfy the debt.
4. Supplemental proceedings may be commenced before the sale of the property levied on, on affidavit, or other proof of its insufficient value. But no final order can be made, appropriating to the creditor any property discovered, until the property previously levied on, has been exhausted.

Harrison v. *Battle*, 1 Dev. Eq., 541.
Sprinkle v. *Martin*, at this Term, cited and approved.

Motion under Sec. 266, C. C. P., heard before *Russell, Judge*, at Fall Term, 1871, at Robeson Superior Court.

The plaintiffs made oath that one John Walker was indebted to them in the sum of four hundred dollars, based upon two magistrates' judgments, docketed in the Superior Court of Robeson county, on the 25th of June, 1870; executions on said judgments are "returned unsatisfied," and they believe that one W. J. Brown has in his possession property of the defendant, or is indebted to him in an amount exceeding ten dollars.

The said W. J. Brown, in obedience to an order directed to him, accepted service thereof, appeared before His
(96) Honor, and made oath that he holds a deed of trust executed to him by John Walker, March 1st, 1870, to

secure certain debts therein mentioned, and if the said debts are not paid off on or before the 1st of January, 1871, then affiant is authorized to sell said lands, apply the proceeds to the payment of said debts, and if any surplus, to be paid to John Walker. Said lands supposed to be worth about seven hundred dollars; that said lands were conveyed by Walker and wife to Roderick McCaskill and J. C. McCaskill, on the 23d November, 1870; it having been previously assigned to John Walker as a homestead, dated November 23, 1870. He further declared that he had never sold said land.

The plaintiffs asked for a decree against W. J. Brown, trustee of John Walker, requiring him to sell the land held in trust by him, and after paying the debts and costs provided for in said deed of trust, then to pay the surplus to the plaintiffs on their executions, which motion was refused, and judgment rendered against the plaintiffs for the costs, from which the plaintiffs appealed.

W. McL. McKay, for plaintiffs.
Thos. McNeill, for defendats.

Rodman, J. The plaintiff, by docketing his judgment, acquired a lien on all the real property of the defendant Walker, in the county of Robeson, at the time of the docketing—C. C. P., sec 254–503. The judgments were docketed 25th June, 1870; the deed in trust from Walker to Brown was made 1st March, 1870. At the time of the docketing, therefore, the defendant Walker had a resulting trust in the land conveyed after payment of the debts secured. The first question to be considered then, is, was this equitable estate subjected to the lien of the docketed judgments. The law before C. C. P. is clear. As to all estates in lands which might be sold under execution at law, a lien was created by the issuing of an execution which related back to its *teste*.
(97) But as to such equitable estates as were not liable to sale under execution at law, but the sale of which to satisfy a judgment, might be enforced by bill in equity, no lien was created by the issuing or levy of an execution, but only by the filing of a bill. The estate of Walker belonged to this last class. *Sprinkle* v. *Martin*, this term.

The reason why no lien was created in such a case, by the issuing of an execution is thus stated by *Henderson, J.*, in *Harrison* v. *Battle*, 1 Dev. Eq. 541. "As therefore it (the re-

sulting trust) could not be levied on or sold by the common law to satisfy the execution, no lien arose from its issuing, or what the Sheriff calls, its levy. For as the lien arises, or is created as a mean to the end, it would be vain for the law to raise it, when the end could not be attained." Whatever was the weight of this reasoning, the rule became settled, and created an unnecessary and inconvenient difference between legal and certain equitable estates on the one side, and certain other equitable estates on the other side.

We think this difference was abolished, as far as in reason and the nature of things it could be, by sec. 254, C. C. P., above cited. This section says that the docketed judgment shall be a lien on all the real property of the defendant; it makes no exception of equitable estates, and certainly, such estates are property.

It must be noted, however, that this section does not make liable *to sale under execution* any equitable estates which were not so by the construction of the Act of 1812, (Revised Code, ch. 45, sec. 4, 5,) before the C. C. P.

In order to sell an equitable estate, not liable to sale under execution at law by that Act, that is to say, one which is neither a pure and simple trust, nor an equity of redemption, the plaintiff in the execution must still resort to his action, as formerly to his bill in equity to ascertain the rights of the parties and enforce his lien. The only effect of the Code is to give him the benefit of a lien by the docketing of
(98) his judgment, instead of by the filing of his bill, or the issuing of his summons in an action to enforce it. Thus the law is made more uniform, and the unnecessary and useless distinction between legal and equitable estates is abolished.

And that is probably as far as the law can safely go in that direction. It must be observed too, that this lien may be waived, or lost, as all others may, by a delay of the creditor to enforce it, until circumstances occur to make its enforcement a fraud upon others. But that point does not arise here, and nothing need be said upon it.

It will be seen that no allusion is made to the fact stated in the affidavit of Brown, the garnishee, relative to the transactions with McCaskill, or to the homestead of Walker. No adjustment of the equities of the parties in the land, can be made in this proceeding. That can be done only in an action brought to sell the resulting trust, when all persons claiming

interests will be brought before the Court, and entire justice can be done. Neither the Clerk, nor the Judge, otherwise than in the regular course of such action, has jurisdiction to order the sale of such an equitable estate.

Having thus stated the position of the plaintiff in respect to the real property of the defendant, Walker, the next question is; did the plaintiff entitle himself to the relief given by sections 264, *et seq.* of C. C. P., under the title of "Proceedings supplemental to execution."

We think the purpose of the Code was to give those remedies to a plaintiff, only in case, the defendant had no known property liable to execution, or to what is in the nature of execution, viz.: Proceedings to enforce its sale, for the satisfaction of the debt, sufficient in value, to satisfy the debt.

In this case, execution issued, which was levied on the estate of Walker. The levy is, perhaps, only material, as showing the knowledge of the plaintiff that Walker had property liable to his debt. Probably, the docketing of the judgment has on real property all the effect of a levy. If there be a
(99) lien on property, it must be shown, either by a sale of the property, or by affidavit, that the property is insufficient in value, to satisfy the debt.

We see no reason why the proceedings given by sec. 266, may not be *commenced* before the sale of the property levied on, on an affidavit, or other proof of its insufficient value, just as a subsequent levy may be made, after a previous insufficient one; but clearly no final order can be made, appropriating to the creditor any property discovered under this section, until the property previously levied on, is exhausted, for until that is done, it cannot be known whether anything is still owing. Until the property levied on can be brought to sale by a proper proceeding, the property discovered by the garnishee, may be levied on, as a security for the deficiency.

In the present case, the plaintiff had neither caused the real property of the defendant Walker to be sold, nor did he make any proof that it was of less value than his debt.

Under such circumstances it could not appear that any thing was due to him, and he did not entitle himself to supplemental proceedings.

Judgment Affirmed.

(100) MARGARET McLENNAN *vs.* R. C. CHISHOLM.

Where a Judge, in response to a prayer for special instructions, complies strictly therewith, it cannot be error. More especially, when his charge is quite as favorable, as the testimony warrants.

Whether under the words "*my plantation*," used in a will, all lands contiguous to the home place of the testator, will pass, *quere*.

Howe v. *Davis*, 10 Iredell, 431. *Bradshaw* v. *Ellis*, 2 Dev. & Bat. 20, cited and commented on.

This was an action of ejectment tried before His Honor, Judge Buxton, at Fall Term 1871, of Montgomery Court.

The question in the Court below was, whether a tract of land, known as the McLeod tract, of 100 acres, passed to the plaintiff under the words "my plantation" contained in the first clause of her husband's will.

Testimony was introduced by the plaintiff to show that the land in controversy, adjoined the lands on which the testator lived or was contiguous thereto. Testimony tending to prove the contrary was introduced by the defendant. His Honor charged the jury, that if the home tract of the testator was contiguous to the Martin tract, then the whole of the Martin land, including the Alexander McLeod 100 acres, passed to the plaintiff, for life, &c., and he added, being thereto requested, that if the testator *claimed*, that all his lands were contiguous, whether they were so or not, the whole would pass to the plaintiff, under the will of the testator.

There was a verdict for the defendant.

Rule for a new trial for alleged error in the charge of the Court. Rule discharged. Appeal to the Supreme Court.

Neil McKay, for plaintiff.
Battle & Sons, for defendant.

BOYDEN, J. The only question made in this case, is, as to the charge of His Honor.

His Honor instructed the jury, that if the Alexan-
(101) der McLeod tract of land, being the land in dispute either adjoined the plantation of the testator, or lay contiguous thereto, the plaintiff was entitled to recover. In this charge, we think that if there was any error, it was certainly not to the prejudice of the plaintiff.

It will be remembered, that there was no evidence, offered on the part of the plaintiff, that the tract of land in controversy had been used by the testator as a part of his planta-

tion. But the plaintiff attempted to show that it adjoined the plantation, or that it lay contiguous thereto; and His Honor instructed the jury that if it adjoined the plantation or lay contiguous thereto, then the plaintiff was entitled to recover.

This was quite as favorable a charge as the plaintiff was entitled to, upon the testimony; as the Court does not hold, that it would certainly follow, that if it adjoined or lay contiguous, it would pass to the devisee under the words "my plantation." It might not, as it by no means follows, that by the term "my plantation," all the adjoining and contiguous lands pass.

The true enquiry was, did the particular tract of land, which lay a mile and a quarter from the residence of the testator, across Mountain Creek, where there was a blacksmith shop, occupied only as such, constitute it, a part of the plantation. It might have been, so considered and so used by the testator, but there is no proof in the cause, that the tract in controversy was and is a part of the plantation, or that it was considered as a part thereof by the testator; but the plaintiff seems to have put her case solely on the ground that the tract is dispute either adjoined or lay contiguous to the plantation; but the jury have found that the land neither adjoined, nor was contiguous.

It is true, that in the case of *Howe* v. *Davis*, 10 Ire. 431, it was settled that as the devisor actually cultivated two tracts, one of which he called his home place, and the other (102) the Brown place, yet, as he cultivated both tracts as one farm, they passed under the designation of his plantation, and in the case of *Bradshaw* v. *Ellis*, 2 Dev. and Bat. Eq 20, the Court held that "my plantation" carried two tracts, which were half a mile apart, when both tracts were cultivated together by the testator as one farm.

In our case there is no proof that the tract in dispute had ever been cultivated as a part of the plantation of the devisor.

THERE IS NO ERROR. Let this be certified.

COUGHLAN, RANDALL & CO. and JAMES FORSYTHE *vs.* R. M. WHITE, SHERIFF, &c.

1. The Circuit Court of the United States, is not, in any sense a foreign Court: its judgments and process bind *proprio vigore*, and create legal rights, which the State Courts are bound to recognize, and will

enforce, when the estate or property subject to the right, comes within their control.

2. Executions issued from the United States Courts create a lien from their *teste*.

3. Where a judgment was obtained, in the Circuit Court of the United States, and execution was issued thereon and levied upon the land of the defendant in said execution, and when a Sheriff had other executions from the State Courts, against the same party issued upon judgments, some of which were of lien before, and others after, the *teste* of the execution from the Circuit Court, and the Sheriff had levied upon and sold the land of the defendant, *held*, that the plaintiffs in the execution from the United States Court were entitled to the residue of the money in the hands of the Sheriff after satisfying the judgments of a *prior lien* to theirs, and that upon a rule in the Superior Court the Judge should have ordered the application, accordingly.

This was a motion, to compel the Sheriff of Mecklenburg county, to apply the surplus of money in his hands, arising from the sale of the real and personal property of one Taylor, after satisfying certain executions of a lien prior (103) to the 29th day of November, 1869, to the payment, of plaintiff's executions. The Sheriff sold the property of Taylor under executions, some of which were of lien prior to the 29th day of Nov., 1869, and others of lien subsequent to that time. After satisfying the first named executions, there was a surplus in his (Sheriff's) hands of about $3,000.

The plaintiffs obtained judgment, in the Circuit Court of the United States, on the 29th day of November, 1869; executions were issued upon the judgments bearing *teste* the last Monday in November, (29th) and came to the hands of the United States Marshal, and were levied, respectively, on the 19th and 29th of January, 1870. The proceeds of the sale, of the personal property of Taylor, was not sufficient to discharge and pay off the executions in the hands of the Sheriff, of a prior lien to Nov. 29th, 1869, but the proceeds of the sale of the realty, was more than sufficient. Upon this statement of facts, the presiding Judge, His Honor, G. W. Logan, refused the motion. From which judgment plaintiffs appealed to the Supreme Court.

W. H. Bailey, (with whom were *Phillips & Merrimon*) for plaintiffs, cited and relied on. *Bayard* v. *Bayard*, 5 Penn. Law Jour., 160. *Azcarati* v. *Fitzsimmons*, 3 Wash. C. C. 134.

J. H. Wilson and *H. W. Guion*, for defendants.

RODMAN, J. On the last Monday in November, 1869,

(being the 29th day of the month) Coughlan, Randall & Co., obtained a judgment in the Circuit Court of the United States for the District of North Carolina against one Taylor, as did also James Forsythe. *Fi fas* upon these judgments, tested of said last Monday in November, 1869, were duly issued to the United States Marshal, and levied by him on the lands of the defendant Taylor, on the 16th of January, 1870.

These lands and certain personal property of the defendant had been previously levied on by the Sheriff of Mecklenburg county, under executions from the State
(104) Courts, tested before 29th of November, or which had issued upon judgments docketed before that day. The personal property had also been levied by a constable prior to 29th November, to satisfy sundry executions from Justices of the Peace.

In April, 1870, the Sheriff sold the personal and real property, and with all of the proceeds of the sale of the personal property, and a part of the proceeds of the sale of the land, paid off the prior executions, docketed judgments and justice's executions, in his hands; leaving a residue of $3,559.92, derived from the sale of the land. The Sheriff had also in his hands at the time of the sale, executions from the State Courts, on judgments docketed, after 29th November, 1869.

Coughlan, Randall & Co., and Forsythe, moved, in the Superior Court of Mecklenburg, that the Sheriff be ordered to apply said residue to the payment of their claims, which order the Judge refused to make, but ordered the Sheriff to apply it to the executions in his hands from the State Courts. From this order they appealed.

We think the principles on which this question must be decided are clear. It was settled law before the C. C. P., that executions levied on land had priority from their respective *teste*. Had the execution from the United States Court issued from the Court in any county in the State and gone into the hands of the Sheriff, there could have been no doubt but that it would have been entitled to priority of satisfaction over judgments docketed after its *teste*.

The United States Courts in this State adopted our former rule that an execution binds from its *teste*, and it still holds in those Courts. But it is said that because the fund is in a State Court, that Court, will ignore the judgments in the United States Court, and distribute the fund exclusively amongst the creditors by judgment in the State Courts, not-

withstanding their subsequent date. We think such a proposition is founded on a misconception of the relations of the several Courts. The Circuit Court of the United
(105) States is not in any sense a foreign Court. Its judgments and process bind *proprio vigore*, and create legal rights which the State Courts are bound to recognize and will enforce, when the estate or property subject to the right, comes within their control. In doing so, they do not proceed on any ground of international comity, but on the ground, of giving effect, to a legal right. By the *teste* of the executions from the U. S. Court, the plaintiffs acquired a lien upon the land of the defendant, subject to prior liens, and the fund now in Court is what remains of that land, after the discharge of the prior liens. If the Sheriff had sold only so much of the lands as was necessary to discharge the executions in his hands, and left a part of the land unsold, the United States Marshal could have sold that part; and his right to have this money, which represents that part of the land, is just the same.

We think the Judge erred. His order should have required the fund to be paid to the U. S. Marshal, to be distributed among the plaintiffs under the order of the Circuit Court. If the fund were in this Court, we could make the order here; but as it is in the Court below, the case will be remanded, to be proceeded in according to this opinion. Let this opinion be certified.

As the Sheriff appears to have acted fairly, the plaintiffs will recover no costs of him, in this Court.

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(106) STATE *v.* MARTHA MATTHEWS.

1. The confessions of a prisoner ought to be received with great caution, and unless they are free and voluntary, and without fear, produced by threats, or inducements of temporal advantage, ought to be rejected.
2. The examination of a prisoner as to his own guilt, taken before a committing magistrate, is not admissible in evidence, when the statement is made under the constraint of an oath, and therefore, not voluntary. The objection to the admissibility of such evidence, is much stronger, if the prisoner be under *arrest*.
3. To authorize the introduction of parol evidence as to confessions of a prisoner, taken before an examining magistrate, it must appear affirmatively that there was no examination recorded as required by law.
4. Under the Act of 1868-'69, ch. 178, the prisoner is entitled to the benefit of counsel, and before his examination it is the duty of the magis-

trate to inform him of the charge against him, and "that he is at liberty to refuse to answer any question that may be put to him, and that his refusal shall not be used to his prejudice." Such examinations are judicial confessions, and the policy of the law requires them to be taken under the protecting caution and oversight of the judicial officer —this caution is an essential part of the proceedings and must be given to a prisoner under arrest, to render his examination admissible in evidence.

5. The reason of the statute extends to an inquisition by a coroner. In this respect, he is, an examining magistrate.

6. When a prisoner is brought before a coroner while he is holding an inquisition, and after witnesses had been examined, a *post mortem* examination made, and a verdict entered up, in answer to a question asked by the foreman of the jury "confessed," *held*, that although after the first question was put, the prisoner was cautioned by the coroner not to answer, the caution came too late, to afford the protection which the law requires, and the confession was inadmissible.

7. When a physician was examined as a witness, and stated that he had examined the prisoner, and was of opinion that she has been delivered of a child within three or four days, and it was proposed to ask him "whether from his experience and knowledge of females, in three or four days after the delivery of a child, and under the circumstances detailed by the evidence, the prisoner was in a frame of mind to give an intelligent answer, or know what she was talking about?" *Held*, that the question was proper, and should have been allowed.

8. The rule of law in criminal cases, requiring proof beyond a reasonable doubt, does not require the State, even in a case of circumstantial testimony, to prove such a coincidence of circumstances as excludes every hypothesis except the guilt of the prisoner. The true rule is, that the circumstances and evidence must be such, as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis.

State *v.* Broughton, 7 Iredell, 96; State *v.* Young, 1 Winston, 126; State *v.* Parrish, Busbee, 239; Queen *v.* Johnston, 2 Heard L. C., cases, 504, *cited and approved.*

This was an indictment for murder, tried before Cannon, Judge, at Forsyth Superior Court, Fall Term, 1871.

The facts of the case are as follows:

On Saturday or Sunday, about the 6th day of May, A. D. 1871, an after-birth was found at a mill pond near the prisoner's residence. The neighbors, believing that a child had been murdered on Monday, drew off the water of the pond in search of its body. While this was going on, the prisoner was brought to the place where the after-birth was found, but then denied any knowledge of it. Nothing being found in the pond, search was made in the woods and the body of a child was found, buried within one hundred yards of the prisoner's house. She and her mother were arrested shortly thereafter. About an hour after dark a coroner's jury and an examining physician arrived at the place and held an in-

quest. The body of the child was brought near the door of the house in which prisoner lived. While the inquest was being held and a *post mortem* examination was being made by the physician, the prisoner was lying on a bed in the house, (which consisted of a single room,) weeping and groaning. Suddenly, she sprang to the door and as suddenly sprang back again, and fell upon the bed and was much excited.

After the *post mortem* examination had been finished,
(108) witnesses examined, and verdict of the jury reudered, the prisoner, in answer to a question asked by the foreman of the jury, confessed. The coroner, after the first question was put, cautioned prisoner, telling her not to answer; that it was none of his business, and that her answers would be used against her. Prisoner's counsel asked His Honor to exclude the confessions. His Honor admitted them and prisoner excepted. The physician stated that he had examined the prisoner, and was of opinion that the prisoner had given birth to a child within three or four days before the inquest was held. The prisoner's counsel proposed to ask witness, "from his knowledge of the condition of females in three or four days after the delivery of a child, under the circumstances as detailed by the evidence, the prisoner was in a condition or frame of mind to give an intelligent answer or know what she was talking about?" This question was objected to, and the objection sustained by the Court. In the argument to the jury, the prisoner's counsel proposed to read from a medical work, certain extracts, not as evidence, but as a part of their argument applicable to the evidence. This was objected to, and disallowed by the Court. The theory of the prosecution was, that the child had come to its death by a blow with a stick on the top of its head. The physician testified, that between the scalp and the skull, he found a collection of coagulated blood about the size of a half-dollar, with several smaller spots of like kind surrounding it. That in his opinion, it was improbable that a blow upon the top of the head, sufficient to cause death, would not have been attended with contusion or laceration of the skin, a fracture of the skull, &c. That the appearance on the head was not uncommon from natural causes. That he could account for the death otherwise than by violence, viz.: by neglect. Upon this testimony the prisoner's counsel asked His Honor to charge the jury, that before they could convict, the evidence must be so strong as to exclude every other reasonable hypoth-

esis than the guilt of the prisoner. His Honor did not so charge, but told the jury the evidence must satisfy them beyond a reasonable doubt.

Prisoner excepted. Verdict of guilty. Rule for a
(109) new trial. Rule discharged. Judgment. Appeal to the Supreme Court.

Attorney General, for State.
Morehead & Watson, for defendant.

DICK, J. The rules of evidence as to the admissibility, on a trial for crime, of the previous confessions of the prisoner, have been much discussed, both in this country and in England, and have given rise to considerable conflict of judicial opinion. It is not necessary for us to enter into this intricate maze of judicial uncertainty, as the principles which govern this case are founded in natural justice and upon high authority. The confessions of prisoners are received in evidence upon the natural, as well as legal presumption, that a prisoner will not make an untrue statement, against his own interest. This presumption is weak or strong, according to the various circumstances and facts of the particular case. All the authorities agree that such evidence ought to be taken with great caution and unless the confessions were free and voluntary, and made with deliberation and without fear, excited by threats, or inducement of temporal advantage, they ought to be rejected as evidence on a trial for the admitted crime. *Nemo tenetur seipsum accusare* was a well established maxim of the common law, and was applicable, both in civil and criminal proceedings. Even the Court of Chancery, in enforcing discovery, does not depart from this general policy of the law, and will not require a party to discover matters to criminate himself, or expose him to a penalty or forfeiture No examination of a prisoner, as to a crime charged against him, was allowed in England until the passage of the statutes of Phil. & M—1 Greenleaf on Ev., 256.

The provisions of these statutes were substantially re-enacted in this State (Rev. Code, ch. 35), and many decisions have been made under them.

It is well settled that the examination on oath of a prisoner as to his own guilt, taking before a committing magis-
trate is not admissible in evidence, as the statement
(110) was made under the constraint of an oath, and there-

fore was not voluntary. *State* v. *Broughton*, 7 Ired., 96. The objection, to the admissibility of such evidence, is much stronger, if, at the time of the examination, the prisoner was under arrest, for the alleged crime. *State* v. *Young*, 1 Winst., 126.

To authorize the introduction of parol evidence, as to the confession of a prisoner, before an examining magistrate, it must appear, affirmatively, that there was no examination recorded, as required by law. *State* v. *Parish*, Busb., 249.

The Courts, in acting under these statutes, have generally construed them with liberality towards prisoners, and have regarded with suspicion, confessions made to "a person in authority," and have thus manifested a tendency to return to the liberal and humane principles of the common law, upon this subject.

The hardships and injustice, which often occurred to prisoners, under the statutes of Phillip and Mary, and the advancing civilization of the age, called for additional legislation in England, which is now embodied in the statute of 11 and 12 Vict. The principles of this statute are contained in the Acts of 1868–'69, ch. 178. Under this statute, the prisoner is entitled to have the benefit of counsel, and before his examination is commenced, it is the legal duty of the magistrate, to inform him of the charge made against him, and "that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice, in any stage of the proceedings," and the examination shall be reduced to writing, and submitted to him for correction and explanation. Such examinations are termed judicial confessions, and the policy of the law requires them to be taken under protecting caution and oversight of the judicial officer. This caution is an essential part of the proceedings, and must be given to the prisoner under arrest to make his examination admissible in evidence.

The reasons of the statute extended to the inquisi-
(111) tion of the coroner, for, in this respect, he is an examining magistrate. When a person is slain, it is the duty of the coroner to make inquiry, as to all the material circumstances attending his death, and find out, if possible, who is guilty of the homicide, either as principal or accessory, and "shall cause them to be taken and delivered to the Sheriff, and committed to jail."

In this case, we are only considering the admissibility in evidence of confessions made in the presence of examining and committing officers. We will not enter upon the many distinctions which have been drawn by Judges, as to what fear, hope, or other inducements will exclude confessions made to other persons in authority, or to private persons.

The law requires its officers to administer justice, with caution and with mercy, and will not allow them to act the part of mere *detectives* of crime.

The fear and apprehension, which is naturally produced by an arrest and charge of crime, which is often increased by his ignorance of legal proceedings, and by the manner, appearance and language of the excited crowd, which is usually present when an examination is taken, are well calculated to throw him off his guard, and deprive him of his usual self-possession and prudence. The present wise and beneficent policy of the law allows a prisoner, under arrest, time for deliberation, and an opportunity to obtain correct legal advice, so that the statements which he may make on an examination, are made of his own free will, and with full knowledge of the nature and consequences of his confessions.

The wisdom and enlightened policy of the statute, which we are now considering, are clearly exemplified in the case before us. From the evidence, it appears that an "after-birth" was found near a mill-pond, which induced the neighbors to believe, that a recently-born infant had been murdered. This circumstance naturally produced much excitement, and caused an active search to be made, in which the body of a child was found. The prisoner and her
(112) mother were arrested, and in a short time the coroner and a jury appeared to make an inquisition. A *post mortem* examination was made in the night time, and near the door of the prisoner's house. "During this time prisoner was in the house, which consisted of a single room, lying on a bed, weeping and groaning, the house filled with persons; that suddenly she sprang up and out of the door, and as suddenly sprang back, and fell upon the bed, and was very much excited. The *post mortem* examination being finished, evidence of witnesses taken and verdict of jury entered up; in answer to questions put by the foreman of the jury—*the prisoner confessed.* The coroner cautioned her after the first question was put, telling her not to answer, it was

none of his business, and that her answers might be used against her."

The caution came too late to afford the protection which the law requires. The record does not set out the confession, but it appears to have been made when the prisoner exhibited great agitation and mental distress, and when she must necessarily have been in a condition of physical prostration. She had heard the evidence of the witnesses, and the solemn verdict of the jury as to her guilt. Her response was to a question of the foreman of the jury, and was made without any previous advice as to her legal rights, and the probable consequences of her statement. She, no doubt, regarded the foreman of the jury as a person in authority, and in her ignorance of the law she felt bound to answer his questions. The verdict of the jury was entered up, and she no longer had any expectation of safety by remaining silent, and, it may be, that she hoped for mercy from her prosecutors, by making a statement in accordance with the verdict of the jury, and the opinion of the crowd. Her mother, who perhaps was her only friend, was under arrest, and charged as the partner of guilt, and she saw no manifestation of sympathy from her neighbors, who believed that she had committed a heinous crime.

(113) Even if a previous caution was not required by the statute, we think, under the circumstances of the case, His Honor would have been justified in rejecting the confessions of the prisoner. The wise and humane rule laid down by Hawkins, before the passage of the Stat 11 and 12 Victoria, is well stated, and is very applicable to this case. "The human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood, or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence, for the law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, P. C., ch. 46, page 595.

As the confession in this case was made before the coroner, without the previous cautions required by the statute, it was inadmissible as evidence, and His Honor erred in allowing

it to go to the jury. 1 Greenleaf on Ev., ch. 12; Roscoe's Cr. Ev., 55; *The Queen* v. *Johnston*, 2 Heard. L. Cr. Cases, 504.

On the trial, the physician who had been summoned by the coroner, stated that he had made an examination of the person of the prisoner, and in his opinion, she had been delivered of a child a few days before the inquisition was taken. "The prisoner's counsel, proposed to ask the witness, from his experience and knowledge of females, in three or four days after the delivery of a child, under the circumstances as detailed by the evidence, the prisoner was in a condition or frame of mind to give an intelligent answer, or know what she was talking about."

This question was a proper one, and the witness ought to have been allowed to answer it. The testimony proposed might have been introduced, before His Honor passed upon the admissibility of the confession, and might have had an important influence in determining that matter. At
(114) the time it was offered, it was inadmissible for the purpose of showing, that, on account of the physical condition of the prisoner, little confidence could be placed by the jury in the truth of her statements.

The hypothesis assumed by the prosecution founded upon the confession of the prisoner was, that the child was killed by a stroke on the top of the head with a stick. The physician who made the *post mortem* examination, stated on the trial, that this hypothesis was "highly improbable," and gave intelligent reasons for his opinion, and "that he could account for the death of the child otherwise than by violence, to-wit: by neglect." If the prisoner, in any manner, exposed the child, with an intent to destroy it, or by any other species of criminal neglect caused its death, she might have been convicted under the second count of the indictment. If, however, the neglect was not deliberate and wilful, but was the result of poverty, debility or mere inattention, she would not be guilty of a criminal offence. Roscoe, C. Ev., 667. There was no evidence to show that the child died from any criminal neglect, so that, there are only two hypotheses which were presented by the testimony. The first founded upon the confession made under the circumstances mentioned; and the second arising from natural evidence, as understood and explained by a witness of scientific knowledge and professional experience, who was prompted by no motive but a regard for justice and truth.

The law presumes a person to be innocent until the contrary is conclusively proved, and the burden of proof is always on the State. All the text writers and numerous judicial opinions declare that criminal cases must not be determined by a preponderence of testimony, but the evidence must be sufficient to produce a full conviction of guilt, to the exclusion of all reasonable doubt. The rule requiring proof beyond a reasonable doubt does not require the State, even in a case of circumstantial testimony, to prove (115) such a coincidence of circumstances as excludes every hypothesis except the guilt of the prisoner; the true rule is, that the circumstauces and evidence must be such as to produce a moral certainty of guilt, and to exclude any other *reasonable hypothesis.* 1 Leading Cr. Cases (Bennett), 322, 3 Greenleaf on Ev., Sec. 29.

When any reasonable hypothesis of innocence exists in the mind of the jury, there must necessarily be a reasonable doubt as to the guilt of the accused, and he is always entitled to the benefit of that doubt.

The charge of His Honor upon the question of reasonable doubt was the usual formula adopted on criminal trials, but under the circumstances of this case, we think he ought to have given the instructions asked by the counsel for the defence.

There must be a *venire de novo.* Let this be certified.

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(116) G. M. GIBBS, Ex'r *v.* THOMAS C. FULLER *et al.*

1. Where a suit was brought in the name of A. B., guardian *vs.* C. D., and was stated on the docket in the name of A. B., g., sometimes in the name of A. B., and sometimes A. B., Ex'r, or Adm'r, and after the death of plaintiff, suggested, and his personal representative was made a party, it continued on the docket in the same name, until judgment was rendered, which was in favor of plaintiff for debt and costs: *Held,* that though the Clerk, as a mere index or memorandum, continued to state the case on the docket as it had stood before, yet, as it was the same case, it was a judgment in favor of the personal representative.

2. When a plaintiff in his complaint, purports to set out a judgment between certain parties, and defendant pleads *nul tiel record,* and it appears from an examination of the record, with *reasonable certainty* that the judgment and record are the same, *held,* to be sufficient.

3. The Supreme Court, cannot reverse the finding of a Judge below, upon the facts, yet they have a right to reverse his rulings upon the legal effect and operation of a record.

4. After judgment, the statutes of amendment cure defects arising from "mistake in the name of any party or person, or for any informality in entering judgment, or in making up a record." Rev. Code, ch. 3;

and "no variance between allegation and proof shall be material, unless it has misled." C. C. P., sec. 128.

This was an action brought upon a former decree of the Court of Equity, of Cumberland county, tried before Russell, Judge, at Fall Term, 1871, of Sampson Superior Court.

The facts necessary to an understanding of the case are fully stated in the opinion declared by the Court.

Under instructions from His Honor, a verdict was rendered for the defendants. Judgment and appeal by plaintiff.

James C. McRae, and *Strange*, for plaintiff.
Fuller & Fuller, for defendants.

READE, J. Suit was commenced in the name of Rob-
(117) W. Gibbs, guardian, *v.* Thomas I. Curtis and others, and in 1860 continued from term to term, until Fall Term 1861, when the death of the plaintiff was suggested, and George M. Gibbs, his executor, made party plaintiff.

Prior to this time, the case was sometimes stated upon the trial docket, Robert W. Gibbs, guardian *v.* Thomas I. Curtis and others; and sometimes Robert W. Gibbs *v.* &c., and at another time, Robert W. Gibbs, adm'r *v.* &c. But still it was all one and the same case.

After George M. Gibbs, executor, was made a party, the case was still at subsequent terms, stated on the trial docket, R. W. Gibbs *v.* &c., until Fall Term 1864, when there was judgment in favor of the plaintiff for debt and cost.

The question is, in whose favor is the judgment? Is it in favor of Robert W. Gibbs, the dead man, whose death had been suggested, because his name had been continued on the trial docket, or is it in favor of George M. Gibbs, the representative, who had been made party, but whose name was not upon the trial docket, but who had been made party plaintiff in the cause?

Evidently the judgment was in favor of George M. Gibbs, the representative, who had been made party plaintiff. It is sticking in the bark, to say, that because the Clerk continued to state the case upon the trial docket, as it had stood before, as a mere index or memorandum, the judgment was in favor of the deceased, and not in favor of his representative.

We are of the opinion, therefore, that the judgment rendered at Fall Term 1864, was a judgment in favor of the present plaintiff as the representative of Robert W. Gibbs, deceased.

That being so, then it is alleged by the defendants that the

plaintiff cannot recover in this case, because the allegation in the complaint is, that the judgment at Fall Term 1864, was in favor of Robert W. Gibbs, and not in favor of the plaintiff in this case, George M. Gibbs.

This defence is to be considered as in the nature of
(118) a plea of *nul tiel record*, to be decided by the record itself, and the construction of the record, was, a question for His Honor.

We do not understand that there was any question as to the authenticity or the terms of the record, but only as to its construction. Was the judgment offered in evidence, the judgment set forth in the complaint? His Honor held that it was not, and instructed the jury, "that the plaintiff had failed to prove his first allegation." And thereupon the jury rendered a verdict for the defendant.

The question is, was His Honor right?

It is true, as we have already shown, that the judgment at Fall Term 1864, was substantially a judgment in favor of the present plaintiff, as the representative of Robert W. Gibbs, deceased.

And it is true, that the complaint in this case states, that the judgment in 1864, was in a suit "between Robert W. Gibbs, plaintiff, and Thomas I. Curtis and others, defendants;" and therefore it must be admitted that the judgment shown by the record as we have construed it, is not precisely, and in so many words described in the complaint; but the complaint does set forth the death of Robert W. Gibbs, and that the present plaintiff is his representative, and it correctly sets forth the other parties to the judgment, and the time of its rendition, and its precise amount of principal, interest and costs. So that with reasonable certainty it is seen that the judgment shown by the record, is the judgment set out in the complaint, and thereby the plaintiff did make out his first allegation.

We think, therefore, that His Honor erred in his instructions to the jury.

And here we think it proper to state, that we do not consider that we are reviewing His Honor upon his finding of the facts—this we are not competent to do; but we are reviewing what we understand to have been, his ruling as to legal effect and operation, of the record.

If there were doubts as to the correctness of what
(119) we have said upon general principles, still we would

think that our statutes are decisive of the case. It is provided that no judgment shall be reversed, impaired, or in any way affected by reason of imperfections, for any mistake in the name of any party or person, or for any informality in entering a judgment, or in making up the record. Rev. Code, ch. 3.

So, no variance between the allegation in a pleading, and the proof, shall be deemed material, unless it have actually misled the party, &c. And the Judge may direct the finding according to the evidence, and amend the pleadings. C. C. P., sec. 128.

THERE IS ERROR. *Venire de novo.*

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(120) STATE *v.* CHANEY WISE.

1. Where time is not of the *essence* of the offence, and there is but *one* statute applicable to the matter, although that statute be recent, or recent and not to take effect until after a specified time, the indictment need not contain an averment that the offence was committed *after* the statute went into operation.
2. But where there are *two* statutes, in reference to the same offence, and the one of subsequent date changes the nature of the offence, or the punishment of the same, the indictment must, by proper averment, refer to the statute under which it was found, so that the Court may see the exact character of the offence, and the nature and measure of the punishment to be imposed.
3. The 20th sec., 35th chap., Rev. Code, is intended to cure only formal defects in the indictment, after judgment, and not omissions of averments, necessary to enable the Court to give judgment intelligently, and, as in this case, to see whether to proceed under the one statute or the other.
4. Therefore, where, by the Act of 1869, the punishment for arson was confinement in the penitentiary, and by the Act of 1871, death, and the offence was committed *after* the last mentioned act, but the time designated in the indictment was *before* it, and there was no averment in the indictment specifying which of the two acts it was found under, and there was a verdict of guilty, and judgment of death, *held*, that the judgment must be arrested.
5. Whether the *Solicitor* may move for judgment, treating the indictment as found under the Act of 1869,—*quere.*

State v. *Lane*, 2 Dev., 567; *State* v. *Chandler*, 2 Hawks, 439, and *State* v. *Putney*, Phil. L., 543, cited and approved.

This was an indictment for arson, tried before *Clarke, Judge*, at Fall Term, 1871, of Craven Superior Court.

The following is a copy of the indictment:

"NORTH CAROLINA, CRAVEN COUNTY. } Superior Court, Fall Term, 1871.

"The jurors for the State upon their oath, present, that Chaney Wise, late of Craven county, not having the fear
(121) of God before his eyes, but being moved and seduced by the instigation of the devil, on the first day of January, in the year A. D., 1871, with force and arms, at and in, said county, feloniously, unlawfully, wilfully and maliciously, did set fire to and burn a certain dwelling house of one Joseph A. Mason, there situate, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

"JOHN V. SHERRARD, *Sol.*"

The evidence was: That the house was burnt, on the 8th day of August, 1871. Evidence was also introduced tending to connect the prisoner with the arson. He was convicted by the jury. The prisoner's counsel moved in arrest of judgment. The motion was overruled by His Honor, and sentence of death pronounced. From which judgment the prisoner appealed to the Supreme Court.

Attorney General for State.
J. H. Haughton for defendant.

PEARSON, C. J. When time, is not of the essence of the offence, and there is but *one* statute applicable to the matter; although the statute be recent, or, although it be recent, and is not to take effect until after a specified day, the indictment need not aver that the offence was committed after the statute went into operation, for the averment, that the act was done, against the form of the statute, and this averment being found by the verdict, which is a part of the record, makes it manifest to the Court, that the fact was done so as to be criminal, within the statute; that is to say, it was committed after its passage, or, after the day specified for it to take effect. *State* v. *Lane*, 2 Dev., 567; *State* v. *Chandler*, 2 Hawks, 439.

We have stated the principle, established by these cases, with the restriction, where there is but *one statute* applicable to the matter, for that was the fact in the cases cited.
(122) The question is left open, in cases where there are *two* statutes applicable to the matter; as in our case. We are to decide, whether the fact of there being two statutes

applicable to the matter, in respect to the punishment only, prevents the application of the principle that the indictment need not aver, that the offence was committed after the statute went into effect.

By the Act of 1869, the punishment for arson or burglary, is confinement in the penitentiary. By the act of 1871, the punishment for these crimes, is death: as the judgment was upon this act, it is set out:

SEC. 1. "Any person convicted according to due course of law of the crime of arson or burglary shall suffer death."

SEC. 2 "All laws or parts of laws enacted since the adoption of the present State Constitution, fixing punishment for arson and burglary, are hereby repealed, so far as the same might apply to such crimes hereafter committed."

SEC. 3. "This Act shall be in force from and after its ratification. Ratified 4th day of April, 1871."

The statute is not worded with perspicuity, but the meaning is: the punishment for arson and burglary committed before 4th April, 1871, shall continue to be confinement in the penitentiary, under the Act of 1869; but the punishment for these crimes committed after the 4th of April, 1871, shall be death.

So we have two statutes not affecting the nature of the crime, and having reference only to the punishments. The statutes do not conflict, so that the former is not repealed by the latter. Nor are the statutes cumulative, so that the two might be embraced in an averment, "contrary to the form of the statutes; but the statutes are independent and separate, one covering arson and burglary, committed before, and the other covering the same crimes committed after, 4th April, 1871.

The indictment avers that the crime was committed "contrary to the form of the statute, in such case made and provided," and the jury found the prisoner guilty, as charged.

(123) How can the Court see from the record, whether the prisoner was convicted under the Act of 1869, or under the Act of 1871? The Court must be informed judicially by the record, under which one of these two statutes, the prisoner is convicted, before it can proceed to judgment. We were not referred on the argument to any authority bearing upon the point, nor have our researches enabled us, to find one. *State* v. *Putney*, Phillips, L., 543. The indictment under the prior act, was found before passage of the Act, 1867.

So the point was not presented. But we are satisfied from the "reason of the thing," that it was error to pronounce judgment, as upon a conviction under the Act of 1871, and that an exception must be made to the principle announced in the cases referred to, of cases like the one under consideration.

Whether, had the indictment, set out a day, on which the crime was committed, that day being after the 4th April, 1871, it would have had the effect to remove the uncertainty and enable the Court to see from the record, that the person was convicted under the Act of 1871, is a point not presented; on the contrary a day before that time, to-wit: 1st day of January, 1871, is set out. We will merely remark, that except where time is of the essence of the offence, the day set out is immaterial, need not be proved, and a variance is not fatal, the day being deemed merely matter of form; for the sake of certainty of statement, generality, even in matters not essential being, "ill pleading." It was suggested, that the defect is cured by Rev. Code, ch. 35, sec. 20, and the judgment cannot be reversed. The provision is—"No judgment upon any indictment for felony, or misdemeanor, whether after verdict or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for the omission of the words, as appears by the record, or of the words, "with force and arms." Nor for the insertion of the words "against the form of the statute, or *vice versa;* nor for omitting to state the time, at which the offence was committed, in any case, where
(124) time is not the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or on an impossible day, or on a day that never happened, &c."

In our case, "time is not of the essence of the offence," in the sense in which the words are ordinarily used in the books, that is, time does not constitute a part of the *crime* of *arson*, and there was no occassion to set it out in the indictment in describing the crime. The suggestion at first had much force. But upon consideration, it occurred to us, that the Act referred to, was intended only to cure formal defects, after conviction, so that the guilty should not go "unwhipt of justice," and evade punishment on technical objections, as had often happened, on the frivolous points enumerated in the Act. The rule "*Noscitur a sociis*" seemed to exclude from

such company a vital defect, such as we have in this case, which could not be cured, unless the Court is to give judgment in the dark, it not being apparent on the record, under which one of the two statutes, the person was convicted, so, of course, it could not be known, judicially, whether the man should be sent to the penitentiary or should be hanged!

Upon full consideration, we are satisfied that the scope of the act must be confined to formal objections, and that the words "nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence," have reference only to the statement of the day, as a formality for the sake of certainty of pleading.

For, although in our case, time is not of the essense of the offence, as night time in burglary, or "when is it made unlawful to do certain things between such a day and such another day in the year," or to do certain things on the Sabbath day, yet as we have seen, in our case, time has a most important effect upon the punishment, and the expression in the Act is not appropriate, for the purpose of expressing a purpose to cure the defect of an omission, to make an (125) averment necessary to enable the Court to give judgment intelligently, and to know whether to proceed upon the one statute or the other: for illustration—had the indictment omitted to set out, that the house was burnt on a particular day, and concluded against the form of the statute entitled "an Act in relation to punishment for arson and burglary," ratified 4th day of April, 1871. Often, indeed, the omission to state a day, when the house was burnt, would have been cured. But, curing a defect, in not averring in some way, under what statute the prisoner was indicted, either by direct reference to the statute as above, or by an averment that the crime was committed after the 4th day of April, 1871, is beyond the scope and intent of the act.

The judgment pronounced as upon a conviction under the Act of 1871, is reversed. This opinion will be certified to the end, that the Court then may allow the motion to arrest judgment under the Act of 1871.

Whether the Solicitor for the State can maintain a motion in that event for judgment as upon a conviction under the Act of 1869, is not ours, at this time, to decide. The averment that the crime was committed on the 1st day of January, 1871, would seem to point to that statute, but as we have seen the day set out is not material, need not be proved

and a variance is not fatal, it may be that judgment cannot be pronounced as upon a conviction, on either one of the statutes, by reason of the uncertainty.

ERROR. This will be certified to the end, &c.

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(126) STATE *v.* HARVEY PERKINS, (Col.)

1. It is settled, that a witness who swears to the general bad character of another witness, may, upon cross-examination, be asked to name the individuals who had spoken disparagingly of the witness, and what was said. This is every day practice. There is a difference between an examination in chief and a cross-examination, when the party endeavoring to sustain the witness, whose general character is attacked, may go into particulars as to persons, and what they said.
2. When a witness was called to impeach the character of another witness, and stated that he did not know the general character of said witness, he ought to have been told to stand aside. Counsel have no right to cross-examine their own witnesses.
3. A challenge to a juror, must be made in "apt time," and before the jury are empanelled. If, after a jury have been empanelled and charged, exception is made, it is not in "apt time." After verdict, it is a matter of discretion for the Judge, whether, under such circumstances, he will grant a new trial.

This was an indictment for burglary, tried before HENRY, Judge, at Fall Term, 1871, of Buncombe Superior Court.

The defendant's counsel interrogated the jurors as they were called, as to their indifference, viz: as to forming and expressing an opinion. No juror was objected to on that account.

The material witness for the State was the prosecutrix. The defendant introduced one Hampton, to impeach witness' character. He swore that witness' character was not good as to truth. The Solicitor, on cross-examination, asked Hampton to name the persons whom he had heard speaking disparagingly of the prosecutrix. Defendant's counsel objected. The objection was overruled. Witness named several persons. The Solicitor then asked what he had heard these persons say. This question was objected to, and objection overruled. Witness then stated expressions that he had heard used to the disparagement of the prosecutrix.

(127) The Solicitor then interrogated the witness, as to grounds of ill-feeling between the persons, whose names he had mentioned, and the prosecutrix, and between himself and prosecutrix. Witness stated facts tending to show ill-feeling. Objection to this question was overruled.

Defendant introduced another witness as to general character. He stated that he did not know the general character of prosecutrix. Defendant then proposed to ask witness whether he did not know her general character for "virtue," and for vindictiveness and malignity, and her general character, growing out of a particular transaction. These questions were excluded by the Court.

Verdict of guilty. Rule for a new trial, for the exceptions above stated, and for the further reason that one of the jurors had been foreman of the grand jury, which found the bill of indictment, which fact was not discovered until after the jury were empanelled, and charged by the Court. The juror stated that if he had belonged to the grand jury, which found the bill of indictment, he had forgotten the fact. Rule for new trial discharged. Judgment. Appeal to Supreme Court.

Attorney General, for the State.
Coleman, for the defendant.

PEARSON, C. J. 1. It is settled, that a witness who swears to the general bad character of another witness on the other side, may upon *cross-examination*, be asked to name the individuals whom he heard speak disparagingly of the witness, and what was said. This is every day practice, and the exception was taken under a misapprehension as to the difference between an examination in chief, and a cross-examination, when the party endeavoring to sustain the witness, whose general character is attacked, may go into particulars as to persons and what they said. This disposes of *Hampton*.

2. The witness Blackwell, called by the defendant, having stated that "he did not know the general character of the prosecutrix," ought to have been told to stand aside,
(128) for the defendant's counsel had no right to cross-examine his own witness.

3. It was the misfortune of the defendant, that neither he or his counsel had been sufficiently on the alert, to enable them to find out the fact in "apt time" to make it cause of challenge, that one of the jurors was on the grand jury, when the bill was found. This might have been a ground for his his Honor in the Court below, to grant a new trial, if he had any reason to suspect unfairness on the part of the prosecution, but all suspicion of that kind was put out of

the qustion, for it was stated by the juror, "if he was on the grand jury he had forgotten it, when he was put on the petit jury." How far this was satisfactory to His Honor, was a matter for him. But we will say that we entirely concur in his conclusion. After a defendant has taken his chances for an acquittal, the purposes of justice are not subserved by listening too readily to objections that were not taken in "apt time."

No error. This will be certified.

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(129) M. W. WITHERS, Exr'x, *v.* T. W. SPARROW AND WIFE *et al.*

The separate estate of a *feme covert*, is chargeable with her contracts, for money borrowed with the assent of her trustee, upon the credit and for the improvement of such estate, although the estate is not charged by, or referred to, in the contract.

The case of *Draper* v. *Jordan*, 5 Jones' Eq., 175, cited and approved.

This was a bill in quity, filed under the former system by the plaintiff as executrix of the will of S. M. Withers against T. W. Sparrow, Martha L. Sparrow, his wife, and James M. Hutchison.

Mrs. Sparrow was entitled to a separate estate in Lancaster District, S. C., and having removed to this State, she, with her husband, filed a petition for the purpose, and obtained the appointment of, the defendant Hutchison, as trustee, in this State.

The cause was regularly transferred, and issues embracing the salient questions of fact in dispute were submitted to the jury at July Special Term, 1871, of Mecklenburg Superior Court, His Honor, Judge Moore, presiding. The facts are sufficiently stated in the opinion of the Court.

His Honor granted a decree in favor of the plaintiff, and directed the *property itself* to be sold, etc.

From this decree the defendants Sparrow and wife appealed.

J. H Wilson, for the plaintiff.

Property in the hands of a trustee, for the sole and separate use of a *feme covert*, and subject to her absolute disposal, will be held liable in a Court of Equity, for any debt she may contract, with an understanding, express or implied,

that they are to be paid out of such property. *Frazier*
(130) v. *Brownlow*, 3 Ire. Eq., 237.

The separate estate of a married woman is not liable to her personal engagements generally, but only when the debt is charged specifically upon her separate estate, with the concurrence of the trustee. *Johnston* v. *Malcolm*, 6 Jones' Eq., 120; *Draper* v. *Jordan*, J Jones' Eq, 175.

Guion, *Vance* and *Dowd*, for the defendant.

Every contract of any nature, entered into by a *feme covert*, without the assent of her husband, express or implied, is void. She may not be sued at law on her contracts If she have a separate estate, before she can charge it at all, the assent of her trustee is necessary, and the English rule in this State, is modified in *Frazier* v. *Brownlow*, 3 Ire. Eq., 237; *Draper* v. *Jordan*, 5 Jones' Eq., 175; *Johnston* v. *Malcolm*, 6 Jones' Eq, 120.

The note or bond of a *feme covert* is not negotiable, for the reason, that from its very nature, it is payable out of a particular fund or estate. Negotiable paper must carry with it a *personal* and certain credit given to the drawer, not confined to anything or fund; it is upon the credit of the *person's* bond, or the *person* who negotiates it. *John Dawkes, and Mary his wife* v. *Lord DeLoraine*, 3 Wilson, 207.

In *Francis* v. *Wizzell*, 1 Madd,, 258: "That the Court has no power against a *feme covert in personam;* but that if she has separate property, the Court proceeds against that. In all cases the Court must proceed *in rem* against. There is no case in which the Court had made a person decree against a *feme covert*, and though she may pledge her separate property, and make it answerable for engagements, yet no decree can be rendered unless the trustees are parties to the suit.

In Adams on Equity, marg., p. 45, "Her disability to bind herself or general property, is left untouched; but she may
(131) pledge or bind her separate property, and the Court may proceed *in rem* against it, though not *in personam* against herself." The rest of the doctrine in Adams, is modified in this State by the cases above cited, and the case of *Fraxier and Brownlow*, mentioned in the note.

See Pearson's views in dissenting opinion in *Harris* v. *Harris*, 7 Ire Eq., 123.

If she may pledge or bind her property by her contracts,

she may specially designate in that contract, what is to be put in pledge or mortgage. She may dispose of the whole, but that does not require that she must dispose of the whole trust estate, at once; she may do so in parts, and at different times, and to different persons. In Story § 1399, "her separate estate will be, in equity, held liable for all the debts, charges, encumbrances and other engagements, which she does expressly, or by implication, charge thereon, for having the absolute power of *disposing of the whole*, she may a *fortiori dispose of a part thereof*."

The plaintiff in this case cannot take a decree, unless she shows an express purpose to charge the separate estate, and that assented to by the trustee. The note alone is sufficient in this State, by Frazier and other cases cited above, also in Pearson's dissenting opinion, now the law, in this State.

Accompanying the note, and executed with it, was a written direction to Mr. Hutchison, the trustee, to pay it out of the South Carolina trust money, when it should be received. To this he assented, and the South Carolina trustee, had also agreed to the same disposition of the funds, in his hands. That fund has not yet been received, and by the case in 3d Wilson, the debt is not payable, as yet, by trustee.

The evidence discloses, that Mr. Withers in lending the money, looked *solely* to the South Carolina fund for repayment, that he took as his security, and if that has proved insolvent, it is his misfortune, and he stands, as very many others have found themselves, as regards their securities.

The judge rendered his decree on the ground of a
(132) general equity. That there was a lien, or that plaintiff had a right to pursue the land improved by the investment of the money he had loaned to Mr. Sparrow, and for which in the first instance he had taken his note.

In this case, however, there is no rule in equity justifying such pursuit. No fraud is alleged; no trust fund has been charged by a breach of trust; nothing converted by the trustee, and no room is afforded for raising an implied trust. "Express trusts are raised and created by the acts of the parties, either by word or writing, but an implied trust is never raised, unless taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions." Story's Eq., § 1195.

Now the words, writings, acts and transactions of these

parties expressly rebut all idea, that the property at Davidson College was, in any way, to be bound for the debt.

In this State, no lien for the purchase money itself, much less will there be a lien for money applied to the improvement of the land. *Campbell* v. *Drake*, 4 Ire. Eq., 94.

W. H. Bailey (representing the children) submitted the following brief:

I. It is submitted that the whole current of American authorities shows that a married woman cannot, in any manner, charge her separate estate, unless the instrument creating the estate also confers in terms the power.

Her common law incapacity remains, unless removed by a power.

Such was the doctrine held by chancellor Kent in *Methodist Church* v. *Jacques*, 3 Johns, Ch. Rep. 78, a decision which has been cited and approved in many other States.

The same doctrine prevails in South Carolina. *Ewing* v, *Smith*, 3 Desaussure, 417, on appeal reversing the Chancellor. which was re-affirmed in *Reid* v. *Lamar*, 1 Strob. Eq., (133) 27. *Calhoun* v. *Calhoun*, 2 Strob. Eq., 331—also, in New York. *L'Amoroux* v. *Van Ransellaer*, 1 Barb. Ch., at p. 37, in Penn. *Rogers* v. *Smith*, 4 Barr, 92; in Tenn., *Morgan* v. *Elam*, 4 Yerg., 375; in Miss., *Doty* v. *Mitchell*, 9 Sm. & M., 435; *Montgomery* v. *Agricultural Bank*, 10 *Ibid*, 567; in Texas, *Magee* v. *White*, 28 Texas, 180; *vide* also, dissenting opinion of Peason, J. *Harriss* v. *Harris*, 7 Ire. Eq, 111; in Virginia, *Williamson* v. *Beckham*, 8 Leigh, 20; in Rhode Island, *Metcalf* v. *Cook*, 2 R. I., 355: in Maryland, *Tarr* v. *Williams*, 4 Md. Ch. Decisions, 68. *Williamson* v. *Donaldson*, *Ibid*, 414.

II. If, on the contrary, the doctrine of the English Courts is the true one, then as it proceeds on the idea that *quoad* her separate estate, she is sole, all the incidents appertaining to an estate held by a *feme sole* must follow: and hence she is entitled (1) to a homestead, it being a pure trust. (2.) And such homestead is no more liable for the plaintiff's debt, (a mere loan,) than any other homestead would be.

It is not the purchase money, as the estate had already been purchased.

III. Mrs. Sparrow, as expressly shown by the pleadings has but a life estate; and as her children are not made par

ties (1) no decree can be made affecting the remainder limited to them, (2) and the doctrine held in some Courts that a *feme covert* can charge her seperate estate, being a creature of equity, should be moulded to suit the convenience of mankind, and should be confined, it is submitted, to cases where there is an unlimited *jus disponendi.*

IV. I submit that the doctrine of the English Courts even, is only applicable where a separate estate is created—a *naked* estate, if I may coin an expression—without restrictive or explanatory expressions, accompanying its creation.

The doctrine is based upon the execution of a power—"implied power"—as the present Chief Justice puts it in *Harriss* v. *Harris,* cited *supra.*

The learned STORY thus explains the principles of (134) the English Doctrine:

"But, in the second place, her separate estate will, in equity, be held liable for all the debts, charges, encumbrances and other engagements, which she does expressly, or by implication, charge thereon; for, having the absolute power of disposing of the whole, she may, *a fortiori,* dispose of a part thereof. Her agreement, however, creating the charge, is not (it has been said,) properly speaking, an obligatory contract; for as a *feme covert,* she is incapable of contracting; but is rather an appointment out ot her separate estate. The power of appointment is incident to the power of enjoyment of her separate property; and every security thereon, executed by her, is to be deemed an appointment, *pro tanto,* of her separate estate." Story Eq. Juris, 2d Vol., § 1399. *Vide* also same work, § 1400, at page 875. Also *Ibid,* § 1401, at pages 879–880.

It is now settled in England, by the leading case of *Tullett* v. *Armstrong.* 1 Beavan, at p. 32, [17 Eng. Ch. Rep. Affirmed on appeal by Lord Cottenham, 4 Myl. and Cr. 377.]

"That, in respect of such separate estate, she is by this court considered as a *feme sole,* although *covert.* Her faculties as such, and the nature and extent of them, are to be *collected from the terms* in which the gift is made to her, and will be supported by this Court for her protection."

So both the nature and extent of the estate and its incidents, amongst which, is the restraint against anticipation, are to be collected from the creating instrument.

There need not be express words to create a restraint

against anticipation, but the intention must be clear. *Sturgis* v. *Corp*, 13 Ves,, 190.

If a separate estate is created, the power of alienation follows as incident; but if a clause of restraint be inserted, then the *feme* is debarred. Why?

There can be but one answer. As it depends upon whether the settlor shall, or shall not, add something to, and thereby (135) qualify the general limitation, the creation of such restraint depends, solely, upon his will.

His will is his intention.

If, then, the settlor declares that the *feme* shall not anticipate, she cannot, because he so wills and intends it.

If he adds such expressions as indicate that his intent was to restrain anticipation, as clearly, as if expressed in so many words, why not give like effect to them? As, in our case, to the words "support and maintenance."

If, therefore, words and expressions are added to the estate, which are inconsistent with the disposal or charging thereof, then the power, which would otherwise be implied, is negatived.

In our case, it appears from the report of the Commissioner to the Court of Equity, in South Carolina, which was confirmed and a decree passed in accordance therewith, [*Vide*, page 16, of the transcript,] that John Stewart, by his will, settled the estate "to the sole and separate use, support and maintenance" of Mrs. Sparrow for life, and then over.

Now, I respectfully submit, that the retention of the property unimpaired was made by the testator *parcel of the estate itself;* and no power to sell or charge can be implied against the expressions "support and maintenance," even according to the stern doctrine of the English Courts.

The power, if implied, must extend to the whole estate, and thus the "support and maintenance" by its exercise, would be abridged or destroyed.

V. It is further submitted, that as the separate estate was created by the will of John Stewart, made, published and proved in South Carolina, where Mrs. Sparrow then had her matrimonial domicil, and as the fund consisted of both real and personal estate, the law governing the rights and obligations of the *feme*, touching such separate estate, is the law of South Carolina, the *lex rei sitæ*, and the law of the matrimonial domicil.

The interpretation of a will made in another State must

be determined according to the laws of that State.
(136) *Knight* v. *Wall*, 2 Dev. & Batt., 125. *Vide* also *Morrow* v. *Alexander*, 2 Ired., 388.

I submit that the principle, here contended for, was substantially decided in the case of *McLean* v *Hardin*, 3 Jon. Eq., 294, and the case of *Moye* v. *May*, there cited.

And, it is fully settled, that after the rights of the *feme* have once attached under the law of the matrimonial domicil, a change of domicil will not have the effect to divest them or change their character. *Beard* v. *Basye*, 7 B. Mon., 133 at p. 141; *Doss* v. *Campbell*, 19 Ala., 590.

If I am right in this position, then according to the law of South Carolina as shown by the cases of *Ewing* v. *Smith*, *Reid* v. *Lamar*, and *Calhoun* v. *Calhoun*, cited *supra*, Mrs. Sparrow had *no power* to charge her separate estate—if the law of South Carolina be treated as a fact, it formed (if otherwise than stated) an essential element of the plaintiff's case, which she has failed to establish:—*quacunque via data*, the bill should be dismissed.

BOYDEN, J. This was an original bill in equity, decided in the Court below, and an appeal taken by the defendant to this Court. The object of the bill was to subject the separate estate of the *feme* defendant, to the payment of a sum of money, alleged to have been borrowed by the wife, with the assent of her trustee, upon the credit and for the improvement of her separate estate.

There was some conflict in the evidence in regard to the loan of the money by plaintiff's intestate to the *feme* defendant, and to enlighten the conscience of the Court, upon this matter, the following issue was submitted to a jury, to-wit: "Was the debt in the pleadings described, contracted on the part of T. W. Sparrow and wife M. L Sparrow, with the plaintiff's intestate, based on the credit of the trust estate of the *feme* defendant, with the consent of the trustee, James M. Hutchison?" Upon the trial of the above issue, His
(137) Honor gave the following instructions to the jury, to wit: "That before the jury could find the issue in favor of the plaintiff, she must satisfy them by a preponderance of evidence:

First. That at the time of the contract, the credit was given to the wife.

Second. That the trustee assented to the contract.

Third. That the wife expressly contracted on the credit of her separate property, and that before she could have a verdict in her favor, the jury must find that the money was loaned for the purpose, and with the assent of the wife and her trustee, and actually invested in improvements on the trust estate." Upon this issue, with the above instructions the jury found in favor of the plaintff, as to the note for nine hundred and ninety-six dollars and thirty-six cents.

The separate estate of the *feme* defendant was settled upon her, in South Carolina; her original trustee residing in that State. The *feme* defendant and her husband removed a portion of the funds of the *feme covert* to North Carolina, and petitioned the Court of Equity for the county of Mecklenburg, for the appointment of a trustee, for the *feme*, which was ordered, and the defendant, James M. Hutchison was appointed, and accepted the trust. The defendants afterwards filed their petition in the same Court of Equity, praying for an order to permit the trustee of the *feme* petitioner to invest a portion of the funds of her separate estate, in lands situated in Iredell and Mecklenburg counties, and a decree was made to that effect; the lands accordingly were purchased with the trust funds, and the Court further ordered, that the sum of fifteen hundred dollars of the trust funds might be expended in improving the lands at Davidson College, so as aforesaid purchased.

That after this decree, the *feme* defendant, with the assent of her trustee, James M. Hutchison, borrowed of the plaintiff's intestate the money now in controversy, and expended the same, in permanent improvements on the land at (138) Davidson College, and the *feme* defendant and her family are now in the occupation and enjoyment of these improvements, which are estimated to be worth more than three thousand dollars.

Upon this state of facts, His Honor below, declared the separate estate of the *feme*, liable, for the payment of the money, thus borrowed and expended, and ordered a sale thereof, unless, before a day fixed in said decree, the money should be paid by the defendants. The question for this Court is, "shall this decree of His Honor below stand, or shall it be reversed for error in subjecting the separate estate of the *feme* defendant, to the payment of the debts, due plaintiff's intestate?"

The law in such a case, in regard to such a settlement made

in our State, must be taken as settled. In the case of *Draper Knox & Co.* v. *Jordan*, 5 Jones' Equity, 175, His Honor, Judge Manly, in delivering the opinion of the Court, in that case says: "We recognize as settled law, the principle upon which the case of *Frazier* v. *Brownlow* stands, viz: that, a wife may, when not restrained by the deed of settlement, with the concurrence of the trustee, specifically charge her separate estate, with her contracts and engagements."

But the Court in that case seemed unwilling to saction the doctrine, that as to the separate estate of the wife, she was to be regarded as a *feme* sole in all respects, as held in England and also in the State of New York. But, however proper, this unwillingness of the Court to recognize that doctrine, might have been at the time of that decision, there can be no reason, since the adoption of our present Constitution, why the English and New York doctrine should not now be followed in our State. It seems to be a general rule, that marriage contracts and settlements, as well as other contracts, are governed by the *lex loci contractus.*

Mr. Chief Justice Parker, in the case of *Blanchard* v. *Russell*, 13 Mass. Rep., 134, remarks that, "the laws of any State cannot, by any inherent authority, be entitled to respect, extra-territorially, or beyond the jurisdiction of the State
(139) that enacts them, is the necessary result of the independence of district sovereignties. But that the courtesy, comity, or mutual convenience of nations, amongst which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws, relative to contracts." So that it is now a principle generally received, that contracts are to be governed by the laws of the State in which they are made.

This we consider the settled law of our State, and we hold that, at least so far as the *limitations* of the estate are concerned, the *lex loci contractus* must prevail.

The settlement by its terms, limited the estate to the wife for life, and then over to such children as she might leave surviving, at her death. There were no words in the settlement denying to the *feme*, the right to charge her estate, but it is said that the decisions of the Courts in South Carolina are to the effect, that under such a contract the wife cannot charge her estate. But, however that may be, it is not necessary for this Court to decide; as this case turns upon altogether a different question. And that is this: the husband

and wife, and her trustee, file their petition in the Court of Equity for the county of Mecklenburg, praying for a decree allowing a trustee to purchase and to invest a portion of the trust funds, in real estate in Iredell and Mecklenburg counties, and to expend thereon, in permanent improvements, $1,500. The trustee not having the money in hand of the trust estate, to make the improvements, the *feme* defendant and her husband, with the concurrence of the trustee, borrowed the money to make the improvements authorized by the decree, and actually expended the same in erecting buildings, and other improvements, estimated to be worth much more than the sum allowed to be expended, and all of which are now in the occupation and enjoyment of the *feme* defendant and her family, so the question is, shall her separate estate, to wit, her life estate therein, be held liable for the money thus borrowed and expended. It would seem that the bare statement of the case, without reference to (140) authorities, would be sufficient, for an affirmative answer. The law in this regard, in our State, we consider fully settled by the authorities cited. No one could doubt, that under the decree, if the trustee had happened to have had the money in hand of the trust estate, the expenditure would have been a proper one. Upon what principle, then, can it be contended that the plaintiff's intestate, who had loaned the fund thus to be expended, and when the jury had found, not only that the funds had been borrowed, but actually expended as allowed, should not be paid out of the *feme's* estate? We think, that, by the principles and rules of equity, not only as administered in our State, but as far as we are aware, in South Carolina, and in every other country where our noble system of equity prevails, the estate of the *feme* would be held liable, for the payment of a debt, in a like case.

The decision of His Honor below, declaring the separate estate of the *feme* bound for the payment of the debt, is affirmed, but the decree must be modified, so as only to subject the life estate of the *feme* to sale.

This will be certified, that the decree below may be modified, in accordance with this opinion.

(141) T. H. WHITESIDES *et al.*, Administrators of J. H. Whitesides *vs.* J. O. WILLIAMS, *et al.*

1. Where it appears to this Court that the Judge below, has from the statement of the appellant, the objection of the appellee and his own notes, been enabled to make out a case containing the substantial merits of the controversy, the appeal will not be dismissed, although there was great irregularity in the proceeding below.
2. Nor will the appeal be dismissed, because the statement of the Judge below, (Judge Henry) was made out of the District in which the suit was tried (9th,) unless the record shows that the appellee demanded to be present, and that by reason of his absence, he was prejudiced, especially when the error consists in the rejection of material and competent evidence.
3. This Court is disposed to extend liberality in matters of appeal-practice, as the profession have not yet become familiar with the new system.
4. If, at a sale of a vested remainder in slaves, a proclamation is made, that if the purchaser did not get the slaves, they were not to be paid for, it is competent and relevant on a trial in an action on the note given by the purchaser, for the vendor to show, that his title to such remainder was a good one at the time of the sale by the purchase of outstanding interest, or otherwise, notwithstanding that the *slaves* themselves were emancipated before the life-estate fell in.
5. At such a sale, (August 1861,) it is evident that the parties did not contemplate emancipation, nor act or talk with reference to such a result; and this is clearly manifested by the terms of the bill of sale thereat, which embraced the contract between the parties, and which is in these words: Received of J. O. W., by note, $1.620, his bid for the interest of J. H. W., dec'd, in two negroes, * * * * * * * * * * * we warrant the title of said negroes, *as to the interest expressed*, unless recovered from the estate of J. H. W. by M. H. W., who forbid the interest mentioned to be sold, and in case said recovery is made by the said M. H. W., *then* the note of the said J. O. W., shall not be recoverable.
6. If the legal title to such remainder was in the intestate at his death, it passed by the sale to the purchaser, and he is bound for the purchase-money.

The cases of *Knight* v. *Leak*, 2 Dev. and Bat., 133, and *Woodfin* v. *Sluder*, Phil. L., 200, cited and approved.

This was an action of debt commenced under the (142) old system, and tried before Henry, Judge, at the Special Term in February, 1870, of Rutherford Superior Court.

The plaintiff declared on a single bill for the payment of $1,620, dated August 13th, 1861, payable six months after date, with interest from date. The execution of the note was admitted. There was evidence offered by defendants that an announcement was made by the plaintiffs, at the sale, to the effect, that they would offer the property, (interest in remainder,) and that if purchaser never got property, he would not

be required to pay for it; there was also evidence, that there was a dispute about the title to the *remainder*, it being or having been, theretofore claimed by one M. H. Whitesides, and that Judge Logan appeared at the sale, and informed the crowd, "that there was a claim by each" meaning plaintiff's intestate, and M. H. Whitesides' and if "the title turned out to be in M. H., the purchaser could go on J. H.'s estate, if in J. H., no difficulty."

It was further in evidence, that at the time of the sale, the life-owner, was an old lady, who is yet living, that it was a likely family of slaves, and that they brought a fair price.

The plaintiffs then offered to prove that M. H. Whitesides, at the time of the sale, had no title whatsoever to the negroes sold, having transferred all his interest to the plaintiff's intestate, and that his interest had been sold under execution, and been purchased by plaintiff's intestate. This evidence was objected to and excluded by the Court.

Plaintiffs also offered to show, that said M. H. Whitesides had abandoned all idea of recovering the negroes, and was seeking to recover the price of plaintiff's intestate, and that he had filed a bill in equity for that purpose. This evidence was also excluded by the Court.

Verdict for defendants. Judgment, and appeal by plaintiffs. The counsel not agreeing, on application, His Honor, Judge Henry, made up the case at Asheville. The facts on this point are sufficiently stated in the opinion of the Court.

(143) *Shipp* (with whom was *W. H. Bailey*) for the appellants.

Bynum for the appellees.

DICK, J. The counsel for the defence moved in this Court, to dismiss the appeal upon the ground, that there is no case stated as required by the C. C. P., sec. 301. In the case made out by His Honor, he says, "the statement of the case by plaintiff's attorney, accompanied by four specific objections thereto, proposed by defendant's attorney, are first transmitted to me by mail out of the District, with transcript of the record, etc., and that no request from the appellant has been made to me in accordance with C. C. P., sec. 301, to fix a time and place for settling the case." The proceeding, is certainly very irregular, but this Court has heretofore been liberal to counsel in such matters, as the transcripts which we

see from every part of the State, show that the profession have not yet become familiar with the new system of legal procedure, and are somewhat disposed to follow the loose practice heretofore in use.

The statement of the case made by the appellant, and the defendants' specific objections, together with the notes of His Honor, enabled him to make out a case containing the substantial merits, of the controversy. As there was no request from the counsel of either party to be present, when the case was settled, His Honor might well infer, that they were willing that he should, in their absence, make out the case for the Supreme Court.

If it had appeared that the defendant's counsel desired to be present, and the rights of their clients had been prejudiced by the irregular proceeding, this Court would order a *certiorari* to have a new, and more formal case, prepared.

A Judge who holds a Special Court out of his regular district, must necessarily have jurisdiction to settle a case tried before him when there is an appeal, and this must be done in the district where the case is tried, unless the pro-
(144) vision of law which is made for the convenience of parties, is waived expressly or by implication.

As the case made out by His Honor, shows error in the rejection of material and competent evidence on the trial in the Court below; we think the justice requires that the case should be submitted to another jury.

The plaintiffs offered for sale, at public auction, a vested remainder in certain slaves, as the property of their intestate. The title to said remainder was claimed by M. H. Whitesides, who forbade the sale. In order to make the property bring a fair price, a public announcement was made to the bidders, that if the purchaser did not get the negroes, they were not to be paid for. The defendant Williams, became the purchaser, executed the note sued on for the purchase money, and received a conveyance of the interest in remainder in accordance with the terms of the sale.

A vested remainder in slaves was a subject of sale, and a purchaser of such interest acquired a property and was entitled to the possession of the slaves on the termination of the precedent life estate. *Knight* v. *Leake*, 2 Dev. & Bat., 133.

The slaves sold, remained in the possession of the owner of the life estate, until they were emancipated. Emancipation, was not contemplated by the parties at the time of sale, and

the public announcement made by the plaintiffs, and acted upon by the defendant, was in reference to the legal title of such remainder, which was in dispute. This is clearly manifested by the express terms of the bill of sale which embraced the contract between the parties, and is not materially contradicted by any of the testimony.

If the legal title was in the intestate, it passed by the sale to the defendant, and was bound for the purchase money. The plaintiffs took no risk, but "the title of said negroes as to the interest expressed," and if the slaves had died, the loss would have fallen on the purchaser, as they were his property, subject to the life estate, and emancipation was their artificial death. *Woodfin* v. *Sluder*, 8 Phil., 200.

No one disputed the title of the intestate but M. H.
(145) Whitesides, and it was material for the plaintiffs to show that the title of this claimant had passed to their intestate.

The evidence, therefore, which the plaintiffs offered to introduce, was admissible, and was improperly rejected by His Honor.

For this error there will be a *venire de novo*.

Let this be certified,

JOHN V. FRANKLIN *v.* W. W. VANNOY, *et. al.*

1. After the rehabilitation of the State, parties who had been arrested as recusant conscripts, had a right of action, against their captors.
2. But such causes of action have been destroyed by virtue of the Amnesty Act of 1866.
3. The seizure of the property of a recusant conscript, at the time of his arrest, is a mere incident to the arrest, and a cause of action therefor, follows the fate of the principal cause, and is likewise, embraced by that Act.
4. The Amnesty Act, thus understood, is not liable to animadversion, as having the effect to divest "vested rights," or otherwise infringe, any provision of the Constitution.
5. During the late rebellion, the Confederate States, and the States composing it, were to all intents and purposes, governments *de facto* with reference to citizens who continued to reside within the Confederate lines, *hence*, the Confederate States and the acts of its Congress, and the Constitution of the State as then ordained, and the acts of its Legislature, constituted during the continuance of the rebellion, THE LAW OF THE LAND.
6. The scope and effect of the Amnesty Act was to recognize this principle.
7. The Amnesty Act is not only constitutional, but a wise, beneficent and remedial statute, and should be liberally construed, on the maxim *privatum incommodum publico bono pensatur*.

(146) The cases of *State* v. *Blackwood*, Phil. L., 240, and *Black* v. *Jones*, 64 N. C., 318; *Cook* v. *Cook*, Phil. L., 583, cited and approved, and the case of *Bryan* v. *Walker*, 64 N. C., 141, cited, criticised and distinguished.

This was an action in the case commenced under the old system, and tried before His Honor, Judge Mitchell, and a jury, at Fall Term, 1871, of Iredell Superior Court. The action was brought for the value of a horse, saddle, bridle and pocket-knife.

The plaintiff declared in three counts:

1. In trover.
2. In case of failing to take due care, &c.
3. In trespass, joined under the statute.

It was in evidence, that the plaintiff, having become liable during the late rebellion to military service, reported to the proper enrolling officer, and was by him allowed to join a company, called "Adam's Company," of cavalry, he furnishing his own horse, &c. It was also in evidence that this company were rambling through the country, evading their enforced service, and that a home-guard company, under the command of one Ellis, captured "Adam's company" as recusant conscripts, and among them the plaintiff, and they took also the plaintiff's horse, saddle, bridle and pocket-knife, and reported to the defendant, Finley, who was enrolling officer at Wilkesboro, the captured party, their horses, accoutrements, &c., and that he caused them to be sent forward and reported to his superior officer, Major Burke, the district enrolling officer at Statesville, who caused the plaintiff to be sent on "to the front." The plaintiff's horse was taken back, but it did not distinctly appear what had become of it, nor of the other articles. The defendants were engaged one way or another in the seizure of the plaintiff's property.

There was evidence of a demand for the property, and also of a sale of the horse by, or concurred in by, the defendant Finley.

The plaintiff requested, amongst other instructions, not necessary to be noticed, the following: "that even if the defendant Finley had authority to arrest the plaintiff, it was (147) nevertheless his duty to take reasonable [care] of the plaintiff's property, and if he failed to exercise due care in that regard, and in consequence thereof, the plaintiff lost said property, he is liable in this action for the value ther of." And the same to each of the other defendants. "That the

defendant Finley had no authority to cause the plaintiff's property to be sent to Statesville, and if by reason of his order to that effect, as admitted by him in evidence, the plaintiff lost his property, he is liable for its value. His Honor declined to give these instructions, and instructed the jury, that "if Adam's Company was a regular organization, under military rule, the conduct of the plaintiff had nothing to do with the case, but if the same was not a regular organization, not under military rule, but that they were *evading their duty to their country*, the capture was legal and regular."

Under the charge of His Honor, a verdict was rendered for the defendants, and the plaintiff appealed.

Fowle and *Bailey*, for the appellant.

1. There was no law of the State or Confederate government, or authority purporting to be a law, which authorized the seizure of this property. Chap. 3, Act 1866–'67; *Bryan* v. *Walker*, 64 N. C., 141.

2. No military officer or subordinate can justify the doing, an illegal act, by producing the order of his superior officers. *Ibid.* *Wilson* v. *Franklin*, 63 N. C., 259; *Black* v. *Jones*, 64 N. C., 318; *Smith* v. *Stewart*, 21 La. Am., 67; *Echols* v. *Stanton*, 4 West Va., 574; *Furguson* v. *Loar*, 5 Bush., 689; *Witherspoon* v. *Woodey*, 5 Cold, 147.

1. Instruction first. (A.) When Finley took possession of the property, he was bound to take reasonable care of it.

Sheriff arrests a man on a horse.

(B.) When he directed the horse, etc., to be sent to Major Burke, it was a conversion.

Espinasse Nisi Prius, 581.

(148) *Duncombe* v *Reeve*, Cro. Eliz., Vol. 1, 783.

(C.) Having taken possession under a *quasi* legal warrant, he became a trespasser, *ab initio*.

Six Carpenter's Case.

Parrish v. *Wilhelm*, 63 N. C., 50.

Second instruction. The fact that plaintiff was evading military service in the Confederate army, does not act to create a forfeiture of his property.

Blackmer & McCorkle and *Armfield*, for the appellees.

PEARSON, C. J. At the end of the war, after the State was allowed to enjoy her rights as a member of the Union, and a rightful government was organized, every one who had during the war, been concerned in arresting and sending a recusant conscript to "the front," was liable to indictment, for assault and battery, and was liable to be sued for the arrest and false imprisonment.

If indictments and civil actions had been instituted, for all of these wrongs and injuries, and others of like character, the Courts would have been oppressed with cases. The Judges would have been perplexed with new questions, growing out of the unnatural state of things caused by civil war. Some Judges holding, with His Honor in the Court below, that "recusant conscripts were evading their duty to *their country*," others holding that the Confederate soldiers were wrong-doers, committing outrages upon the good citizens of the country, and to be treated in the view of the Courts of the rightful government, as violators, of the laws of their country. The result would have been innumerable feuds, so that the country could not have enjoyed, even a partial return to good order and good neighborship, for a generation to come.

Deeply impressed by these considerations, it was deemed wise by the General Assembly, in 1866, to pass what is known as the "Amnesty Act"; by it, a stop is put to all in-
(149) dictments, and by the 4th section, it is provided: "No person who may have been in the civil or military service of the State, or of the late Confederate States government, or in the service of the U. S. government, shall be held liable in any civil action for any act done in the discharge of any duties imposed upon him by any law or authority, purporting to be a law of the State or of the late Confederate States government."

The first question is, are the defendants embraced by "the Amnesty Act" in regard to this cause of action? The verdict fixes the fact, that the plaintiff and those with whom he had associated himself, were recusant conscripts and deserters from the Confederate service, who had gone from the county of Surry, towards the State of Tennessee, (with an intent to evade military service under the Confederate States, and probably with an intent not to fight on either side,) as far as ten miles above Wilkesboro, whereupon Capt. Ellis, at the head of a Confederate company, with Vannoy and others

as "home guards," by the orders of the defendant Finley, the enrolling officer, stationed at Wilkesboro, captured the plaintiff and his associates, together with their horses and accoutrements, and reported to Finley, who ordered the other defendants to take the men and their horses, etc., and report to Major Burke, who was in command at Statesville. From the instructions asked by the plaintiff, and the instructions given, we infer this was the last the defendants had to do with it; the plaintiff was ordered to Richmond, and has never recovered the horse, saddle, briddle and pocket-knife, wherefor he brings his suit.

It is clear, that in regard to the assault and battery, and to the civil action for arrest and false imprisonment, the defendants are embraced by the Amnesty Act. They belonged to the Confederate army, and the "home guard," and made the arrest and did the other acts, in discharge of a duty imposed by an act, purporting to be a law of the State. Also, of an act purporting to be a law of the late Confederate States. It would be strange if the plaintiff cannot
(150) sue for the injury in seizing him, taking him as a prisoner to Wilkesboro, thence to Statesville, and thence to Richmond, that he can come back and sue for the loss of horse, saddle, briddle and pocket-knife! The taking and subsequent loss of this property was an incident of the principal act of seizing and taking him off as a prisoner; the greater includes the less—the incident follows the principal: our conclusion is, that the action for the loss of the property, which was a mere consequence of the act of seizing him, is likewise embraced in the Amnesty Act. The words are broad enough to embrace it, and it certainly comes within the mischief intended to be remedied.

The case is not like that put by Mr. Fowle, of a Sheriff, who arrests a man on a horse, and assumes to take care of the horse, and by an abuse becomes a trespass "*ab initio.*" For here, the defendants were wrong-doers, from the beginning, both as to the man and his horse, actually and not by relation; and the Amnesty Act, which relieves them from liability for taking the man, must also relieve them from liability for taking his horse, which was a mere incident or necessary consequence, unless they turned the horse loose in the woods. We are not to be understood, as holding that soldiers can protect themselves for taking private property by the command of an officer, for it is settled to the con-

trary—*Bryan* v. *Walker*, 64 N. C., 141—where the defendants are made liable for seizing a wagon and two mules, under the orders of a Brigadier General, for the transportation service of the detachment, and it is held, the case was not embraced by the Amnesty Act; for the duty of seizing private property for such a purpose, was not imposed by any law purporting to be a law of the State or late Confederate States, and the General was not warranted by any law in making the order; so, then, the order did not protect the defendant, but here, the duty of arresting the plaintiff was imposed by a law purporting to be a law of the State or late Confederate States, and the taking of the horse was an incident which follows the principal, and is for like reason embraced
(151) by the "the Amnesty Act." The right of action for the collection of taxes, and the "tenth part of the crops," during the war, was a right of action for an injury to property, and yet this right of action for an injury to property is embraced by the Amnesty Act, by its very terms, for these exactions were made by a law, purporting to be a a law of the late Confederate States, so the distinction taken between a right of action for injuries to the person, and a right of action for injuries to property, cannot be supported.

In the second place, had the General Assembly power to pass the Amnesty Act?

It seems to be agreed, that in regard to indictments and civil actions for trespass to the person, the General Assembly had the power. This Court so held in regard to indictments —*Blackwood's case*, Phil. L. 240—and from the fact that the plaintiff has not sued for the injury to his person, it might be inferred he has been so advised, in regard to the action. But it is insisted that his right of action for loss of property, cannot be taken away, as it is "a vested right" protected by the *Constitution—declaration of rights sec. 12.*

"No person ought to be taken, imprisoned, or deprived of his freehold, liberty, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, except by the law of the land."

The first reflection is: these words extend to liberty, as well as property, and if the General Assembly had power to pass an Amnesty Act in regard to the arrest and imprisonment of the person, why has it not also the power to embrace rights of action for injury to property? If it has not power to do the one, it has not power to do the other, for both are mere

rights of action, one for an injury to the liberty of person, the other for an injury to property; let it be remarked, the right of action for the injury to property does not in any way grow out of a contract; the question is not complicated by the learning, as to "impairing the obligations of
(152) contracts." So the right of action for injury to property, stands on the same footing, as the right of action for injury to the person.

The second reflection is: rights of action, both for injuries to person and property at the common law, died with the person, and could not be maintained by, or against the personal representative—otherwise as to a right of action arising in contract, and a right of action *for property* which had been taken in his life time. The plaintiff, after he came back, had a right to sue for his horse, saddle, bridle and pocket-knife, provided he was able to trace the articles or any one of them, no matter how many hands the property had passed through; for his ownership was not divested. See *Black* v. *Jones*, 64 N. C., 318.

So note the diversity between a right of action for an injury to, or deprivation of the possession of property, and a right of action for the property itself. This proves, that the dictum in *Bryan* v. *Walker*, as to contracts and vested rights, goes a little too far, and fails to note the diversity.

The third reflection is: whatever may be thought of the relations of the Confederate States, and the States comprising it, towards the government of the United States, it is certain that the government of the Confederate States, and of the States comprising it, were to all intents and purposes, governments *de facto*, in reference to citizens who continued to live in that part of the United States; so that, the Constitution of the Confederate States and the acts of its Congress, and the Constitution of the State as then ordained and the acts of its General Assembly, constituted and made the "law of the land," during the continuation of the war.

The scope and effect of the Amnesty Act is to make a recognition of this fact, by the rightful government afterwards established, and to give validity to the legislation of the late *de facto* governments, with certain restrictions, and validity was given to the acts of its judiciary, to marriages, and all acts of the kind. *Cook* v. *Cook*, Phil., 583; the whole resting upon broad principles of public policy.

For these reasons, we declare our opinion to be, that

(153) the General Assembly had power to pass the "Amnesty Act," and that it is a wise, beneficient and remedial statute, which ought to be liberally construed, on the maxim, "private right must yield to public good." "It is better that a few should submit to loss than that all should suffer inconvenience." "*Privatum incommodum publico bono pensatur.*" *Broom's Legal maxims.*

In plain English, public policy regards, that the plaintiff and other loyal citizens, whose rights of person and property had been outraged, should submit to the loss, rather than that the country should suffer the "ills untold" which were arrested by "the Amnesty Act."

THERE IS NO ERROR. Judgment affirmed.

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(154) JEREMIAH M. KESLER, Adm'r of the estate of Henry C. Utley *vs.* WILLIAM A. SMITH.

1. To give operation to the maxim *leges posteriores, priores contrarias abrogant* the latter law must be in conflict with the former, therefore, when a later statute is almost *in ipsissimis verbis*, with a former one, *held*, that there was no repeal of the former.
2. The statute, Rev. Code, chap. 1, sec's 9, 10, 11, is not repealed by Acts 1868–'69, chap. 113, sec's 70, 71, 72, 114.
3. In actions to recover damages for an injury resulting in death, brought under our act, the correct rule touching the *quantum* of damages, is, the reasonable expectation of pecuniary advantage, from the continuance of the life of the deceased.
4. In such actions, evidence of the number of children left by the deceased, is inadmissible as irrelevant, and calculated to mislead the jury.
5. In such actions, it is competent to prove the age, strength, health, skill, industry, habits and character of the deceased, with a view to arrive at his pecuniary worth to his family.

The case of *Collier* v. *Arrington*, Phil. L., 356, cited and approved.

This was an action of trespass, *vi et armis*, commenced under the old system under the provisions of chap. 1, sections 9, 10, 11 of the Rev. Code, brought by the plaintiff as the administrator upon the estate of one Henry C. Utley, for the unlawful killing, by defendant, of his intestate, and was tried at July Special Term 1871, of Cabarrus Superior Court, before His Honor, Judge Moore, and a jury. The defendant in open Court, admitted the unlawful killing, and the *sole point* at issue and tried, was, the question of damages.

Many questions were raised, but those, only, are noticed upon which the opinion proceeds.

The plaintiff offered to show the number of the de-
(155) ceased's family at the time of his death; this evidence was objected to by the defendant, but admitted by the Court.

The defendant proposed to prove that the deceased was often engaged in fights, &c.; this was objected to by plaintiff and rejected by the Court.

It was in evidence that the deceased furnished supplies to his family, and was seen carrying them provisions, &c. In reply, the defendant offered to show that the deceased was in the habit of trading with slaves, unlawfully. This evidence was objected to by the plaintiff and rejected by the Court. There was a verdict for $1,500 for the plaintiff and the defendant appealed.

Fowle and *W. H. Bailey* for the plaintiff.

Dowd (with whom was *J. H. Wilson*) for the defendant, filed the following brief:

The measure of damages is the *pecuniary loss* resulting from the wrongful killing. It was not to give damages *punitory*, or by way of *solatium* for wounded feelings, &c. See *Collier* v. *Arrington*, Phil. Law, 356, and cases cited in Mr. Moore's brief. Also *Penn R. R. Co.* v. *Butler*, 57 Penn., 335. The rule for estimating damages, as laid down in the last mentioned case, being "to take into consideration the age of the deceased, and his ability, and his disposition to labor, and his habits of living and expenditures."

As to effect of repeal of statute under which case of action is given, without saving clause, see *Gov.* v. *Howard*, 1 Murphy 465, *Pond* v. *Horne*, 65 N. C. Rep., 84, 2 Blackstone, 436. The statute '68-9 gives cause of action in similar, but not, in the *same cases* as Rev. Code.

READE, J. The statute upon which this action is founded, is as follows:

"9. Whenever the death of a person shall be caused by the wrongful act of another person, and the wrongful act is such as would have entitled the party injured to maintain
(156) an action, and recover damages in respect thereof, if death had not ensued, then and in every such case,

the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have heen caused under such circumstances, as amount in law, to felony.

10. Every such action shall be brought by, and in the name of the personal representative of the deceased, and the amount recovered shall be disposed of, according to the statute for the distribution of the personal property in case of intestacy, and in every such action, the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, &c.

11, The amount recovered in every such action shall be for the exclusive and sole benefit of the widow and issue of the deceased, in all cases where they are surviving." Rev. Code, ch. 1, ss. 9, 10, 11.

In 1868–'69 the foregoing statute was, in substance, and almost in the same words, embodied in an "Act concerning the settlemont of the estates of deceased persons." And the same Act repeals "all laws and clauses of laws in conflict with the provisions of this Act"

Acts 1868–'69, ch. 113. Secs 70, 71, 72, 114.

The defendant insists, that the Act of 1868–'69, which was subsequent to the cause of action in this case, repeals the Rev. Code under which the action was brought, and that leaves the case to be considered, as if the Rev. Code had not existed, and so the action could not be maintained.

It is not necessary for us to decide what would be the effect of repealing a statute, under which a cause of action had arisen, pending the action. See Rev. Code, ch. 108; because we are of the opinion that the Act of 1868–'69, does not have the effect of repealing the Revised Code Statute, because they are not in conflict.

(157) The English Statute, 9–10, Vic. c. 93, is substantially the same as ours. It is not precisely as definite as ours, as to the rule of damages, inasmuch as our Statute specifies "*pecuniary injury*," whereas the English Statute also makes it the duty of the jury to apportion the damages among the beneficiaries, which ours does not.

Although the English Statute omits, *pecuniary*, yet the rule of damages, which the Courts have laid down, is "the reasonable expectation of pecuniary advantage, from the continuance of the life of the deceased." We have carefully

examined the English cases, and although the rule is not laid down in all of them, in precisely these words, yet, in substance, it is; and the *rule* may now [be] said to be *settled* as above. *Dalton* v. *South Eastern Railway Co.*, 93 Eng. C. L. R., 296. *Pym, adm'r*, v. *The Great Northern R. W. Co.*, 116 Eng. C. L. R., 396.

It is well settled, that nothing is to be allowed, as a solatium, or as a punishment.

The same rule is laid down *arguendo* in *Arringtnn* v. *Collier*, Phil. R., 355, which is the only case, in which it has been discussed, in our Court. We adopt the rule stated above.

To bring this case under the rule, the principal enquiry is, "what was the reasonable expectation of pecuniary advantage to the family of the deceased from the continuance of his life?"

On the trial below, the plaintiff offered to prove the number in the family of the deceased at the time of his death; and the evidence was admitted. And this was the first error.

We were informed upon the argument, that the idea was, that the condition and number of the family of the deceased ought to affect the damages, inasmuch as it required more to support a large family than a small one, and that if two men were killed, of precisely the same capacity for labor, and of the same occupation and thrift, and one left a family of ten, and the other of five, the large family would be entitled to as much again as the small.

This would be so, if the necessities of the family, (158) and not the value of the life, of the deceased, were the rule. But we have seen that is not the rule. If a man's net earnings are but $100 per annum, that is his pecuniary value to his family, whether large or small. It was said to be important in another view: it was insisted that the deceased by his earnings supported his family, and that by ascertaining how many there were in family, and then estimating what it was worth, or what it would cost to support each, would give the amount necessary to support the whole, and that would give the value of his earnings.

The answer is, that this would involve many inquiries as to what the family contributed to their own support, and in what style they lived, and what was the quality of their food and raiment, &c. And that a much more direct and accurate way was to estimate the value of his labor, or the

amount of his earnings. If it was supposed, as it seemed to be, that the English authorities allowed of enquiries into the number and condition of the family, it was because there the jury have to apportion the damages to each member of the family, dividing it out, and, if need be, giving more to one than another. But such is not the case here.

It seems that the deceased was a common laborer, and that his only legitimate earnings, were from his labor; and, in answer to proof on the part of the plaintiff, that the deceased "furnished supplies to his family, and was seen carrying them provisions, &c.," the defendant offered to show that the deceased was in the habit of trading with slaves, unlawfully. And the defendant also offered to show that the deceased "was often engaged in fighting," and "was often indicted." This evidence was ruled out, and the question is, was it competent?

What would have been the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, if he had been an industrious, peaceable, honest man? And what would it have been, if he had been an idle, quarrelsome, violent, dishonest man? Would the ex-
(159) pectations in either case have been the same? If so, the evidence was immaterial, and was properly ruled out. If not, then there was error. It was competent to enquire into his age, his strength, his health, his skill and industry, his habits and his character, the end of all being to get at his pecuniary worth to his family—how much net income might be reasonably expected.

THERE IS ERROR. *Venire de novo.*

N. T. HORTON *v.* R. R. MCCALL.

An execution debtor is entitled to a PERSONAL PROPERTY EXEMPTION, notwithstanding an execution, issued against his property, bore *teste* before the adoption of the Constitution, if there was no levy, made until after.

The cases of *Hill* v. *Kesler*, 63 N. C., 437, and *McKeithan* v. *Terry*, 64 N. C., 25: *Harding* v. *Spivey*, 8 Ired., 63, and *Jones* v. *Judkins*, 4 Dev. & Bat., 456, cited and approved.

This was a civil action, tried before His Honor, Judge Mitchell, and a jury, at Fall Term, 1871, of Caldwell Superior Court.

The plaintiff complained against the defendant, who is Sheriff of Caldwell county, *in trover*, for the conversion of certain personal property, which was ascertained to be the plaintiff's personal property exemption, unless the defendant, who, answered "justification under legal process," could sustain such defense, under the following state of facts: At Spring Term, 1867, one Gilbert obtained judgment against the defendant, in the Superior Court of Caldwell, and caused a *fi fa*, to issue to Fall Term, 1867; from that term, an *alias* issued to Spring Term, 1868; from that term a *pluries*, issued to Fall Term, 1868, tested of Spring Term, 1868; from that (160) term, another *pluries*, to Spring Term, 1869; all of which bore *teste* of the next preceding term, to that to which they were made returnable; under the last *fi fa*, the property, tor the conversion of which this action was brought, was levied on and sold by the defendant, as Sheriff.

A verdict was taken, with leave to set it aside, &c. His Honor, on consideration, being of opinion with the plaintiff, rendered judgment on the verdict, and the defendant appealed.

Folk, for the plaintiff.

In the case of *McKeithan* v. *Terry*, 64 N. C. Rep,, p. 25, the *fi fa* had been levied on land, and returned, before the adoption of the State Constitution. The Court said, by this levy, the plaintiff acquired a specific "lien," "a vested right." The lien referred to, in that case, was not acquired by the levy simply, but by the *fi fa*, levy, and return of the *fi fa*. *Judge* v. *Houston*, 12 Ired. Rep , 113; *Gilkey* v. *Dickerson*, 2 Hawks, 390. But though the lien, created on land, by a *fi fa*, from its *teste*, is not changed by a levy alone, its effect is very different with regard to chattels. By a levy, the property, in chattels, is divested out of the defendant, and vested in the Sheriff, and the execution satisfied, to the value of the property, unless it is returned to the defendant. If the Sheriff, after levy and before sale, goes out of office, he must, nevertheless, sell the property; if he dies, it goes by succession to his personal representatives. This is nothing less than a vested right of property, not at all like the lien on lands, created by the levy of a *fi fa*, and its return. It is also insisted, that the lien created on chattels, by a *fi fa*, before levy, is a vested right. This depends on the nature of the

lien, its strength and efficacy. Liens proper, at common law, depend on possession; if the possession is surrendered, the lien is gone. The lien, by execution, operates without possession, and is available, by way of charge, and not
(161) detention; it binds property from its *teste*, and the lien is continued, if regular *alias*, and *pluries fi fas*, are issued. It passes, with an assignment of the judgment to the assignee, or, upon the death of the plaintiff, to his executors or administrators. It binds the property of the debtor so as to avoid any alienation by him, after its *teste*.

This is so undoubtedly true, as to require no authority to support it. The cases, however, of *Stamps* v. *Irwin*, 2 Hawks, 232. *Finley* v. *Lea*, 2 Dev. & Bat., 169, may be referred to, in which the point was decided in ejectment and trover. If chattels be levied on by a *fi fa*, and then another of prior *teste*, come to the Sheriff's hands, it is his duty to sell and apply the money to that of elder *teste*, although by the levy made under the first, the property was vested in him for its satisfaction. *Green* v. *Johnson*, 2 Hawks, 309. Where a *fi fa* issued against one, who was a joint-owner of slaves with others, and afterwards, upon the petition of all the joint-owners, the slaves were directed, by a Court of competent jurisdiction, to be sold for division, and under the order, were sold; it was held, that the lien of the Sheriff was not divested, but he had a right still, to sell the undivided interest of the defendant, in the execution, and although the purchaser had no actual notice of the lien, yet, as to him—*caveat emptor*. *Harding* v. *Spivey*, 8 Ired. Eq., p. 63. The plaintiff then, had acquired a lien from the *teste* of his original *fi fa*, which, neither the alienation of the debtor, the active diligence of others, or the judgment of a Court of record, or anything except his own default and misconduct, could destroy. If this is not a vested right, substantially a right of property, it is because carefully guarded legal defences, do not make one.

Accordingly, it is held by high authority, that a statute, prescribing that a debtor may remove the property on which his creditor has a judgment lien, without rendering the property liable to sale, on execution, is unconstitutional. *Tillostan* v. *Millard*, 7 Min., 513.

Armfield, for defendant.

READE, J. It is settled by a series of decisions,
(162) that an execution creates a lien, on both real and per-

sonal property, from its *teste*. *Harding* v. *Spivy*, 8 Ired. Eq., 63.

It is also settled, that if there is no levy or sale under the first execution, but the same is returned to Court, and another is issued upon the same judgment, the lien of this second, relates back to the *teste*, of the first. And so on with any number, regularly and consecutively issued.

But still the question remains, what sort of lien is created, and what is its effect? It is settled that the lien is such as to prevent the debtor from selling, so as to defeat that debt. *Jones* v. *Judkins*, 4 D. & B., 456.

But still it seems to be only a *lien*, and does not divest the title out of the debtor; nor invest it in the creditor; nor in the officer.

It would seem, therefore, that the lien does not affect the title, and amounts only to a charge which the law imposes upon the property for the purpose of satisfying its process. And so it seems that while this lien exists, if the creditor delays to make the lien specific by a levy, (taking hold of the property, if it be personalty, or naming and describing it, if it be realty) and selling it, a junior execution can come in and take the property from under the prior lien and sell it for the satisfaction of the junior. It is true the reason given for this, is, the *delay* of the first creditor, which operates as a fraud upon other creditors; and therefore the law withdraws the care which it had assumed over, and the charge which it had imposed upon the property in favor of the senior creditor, and transfers them in favor of the junior creditor. But, then, if the senior creditor had any *property* in the goods of the debtor upon which his execution had been a *lien*, the law could not thus transfer his *property* to another.

The question in our case is, whether the homestead and personal property exemption laws, prevent the taking and selling the property of the debtor, which had become subject to the lien aforesaid, *i. e.*, the lien of an execution (163) tested, but not levied, before the law was passed.

We have already decided, that the debtor's property might be exempted, and that it was exempted by the said laws from liability for any of his debts. But that was upon the ground that *debts* were not liens upon property, either general or specific. *Hill* v. *Kesler*.

But this case differs from that in this: The creditor has

taken one step towards subjecting the debtor's property, and although the debtor's property has not been appropriated, or taken hold of, yet it was hedged in, in so far that the debtor himself could not dispose of it so as to defeat that debt; yet, he could use it, and consume it as before, and another more vigilant creditor might take it.

In *McKeithan* v. *Terry*, we decided that where there was a *levy*, it created a specific lien, or vested right, which the homestead law did not interfere with. If we did not go too far in that case, we are satisfied that we cannot go farther, in favor of the creditor, without doing violence to the Constitution and the act of Assembly. Here there was no levy; and although there was a lien, such as we have described by the execution, from its *teste*, yet it did not divest the property out of the debtor, and was not even specific, as in McKeithan's case, but was general; and, therefore, the property was subject to the exemption laws aforesaid.

There is no error. Affirmed.

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(164) AARON LADD *v.* JESSE P. ADAMS.

An execution debtor is entitled to a HOMESTEAD, as against an execution, which bore *teste* before, but was not levied until after, the adoption of the Constitution.

The cases of *Hill* v. *Kesler*, 63 N. C., 437, and *Horton* v. *McCall*. at this Term, cited and approved.

This was an appeal from the decision of his Honor, Judge Mitchell, on a case agreed, made at Spring Term, 1871, of Wilkes Superior Court. The only facts necessary to a proper understanding of the opinion, are, that the plaintiff obtained a decree against the defendant in this Court, on the equity side, at June Term, 1868, and caused an execution to be issued thereon, which bore *teste*, the second Monday in June, 1868. Under this execution a levy was made on the land, for the recovery of which, this action was brought on *the 2d day of August*, 1868, and a sale was, thereafter duly effected thereunder, at which the plaintiff became the purchaser.

The defendant, before the sale took place, claimed a homestead therein, and when this was refused, demanded that it should be appraised, etc. Other points were raised, but not necessary to be stated, as the opinion proceeds entirely on the main point, viz., whether a homestead could be demand-

ed, as against an execution bearing *teste*, before the adoption of the Constitution, but not levied until after. His Honor gave judgment in favor of the defendant, on the case agreed, and the plaintiff appealed.

W. H. Bailey, for the appellant.

I. The execution created a lien on the land from its *teste*. This has been the settled doctrine of our Courts, ever since *Winstead* v. *Winstead*, 1 Hay., 243, as announced in numerous subsequent decisions, running through the period (165) of the Court of conference, and our former Supreme Court, and has been acted on in *practice* for the last seventy years, both by lawyers and laymen as *settled law*.

Many titles rest upon this assumption, which a contrary decision would greatly tend to unsettle and embarrass, as well as lead to inextricable confusion, and open a flood-gate to litigation.

Interest republicae ut sit finis litium est.

The execution, I submit, binds from its *teste*, certainly as against the defendant therein, and those claiming under him. *Stamps* v. *Erwin*, 2 Hawks, 232.

And the principle was extended to executions from a single Justice, until changed by statute. *Beckerdite* v. *Arnold*, 3 Hawks, 296.

It is foreign to our case, to consider the effect of its lien, *quoad* other execution creditors, &c, as the defendant in the execution is the present defendant.

But, I may add, that the policy of the Courts has ever been to protect *bona fide* purchasers at execution sales, in various ways, thus presenting a harmonious analogy to the various statutory enactments in favor of other *bona fide* purchasers, and such a policy was judicially declared in *Irwin* v. *Harris*, 6 Ired. Eq., 215.

II. * * * * * * * * *

III. * * * * * * * * *

IV. The homestead law, as to any retroactive effect on the debt in question, it is submitted, is in violation of the Constitution of the United States, in that, it impairs the obligation of contracts.

I do not propose to argue this point, unless called on by the Court, but wish to present it, and if desired, will argue it.

Bragg & Strong and *Armfield*, for the appellee.

CURIA ADVISARI VULT.

(166) At the present term, the following opinion was delivered:

READE, J. In the learned brief of the plaintiff's counsel, it is laid down, that an "execution creates a lien on land from its *teste.*" And that this is sustained by a train of decisions, acted on in practice for seventy years, both by lawyers and laymen, and that a contrary decision now, would unsettle titles and produce inextricable confusion and endless litigation. We would hesitate long, to make a decision which would produce such effects, even if there were legislation or other considerations, leading us strongly in that direction. But there is nothing in this case which puts any such stress upon us. We affirm all the decisions and praise the discernment of both lawyers and laymen, which has maintained the doctrine that an "execution creates a lien on land from its *teste.*" But just at the point where we have the greatest difficulty, we have the least aid, and yet evidently, all, that could be afforded in behalf of the plaintiff. It creates a "*lien.*" but then, what is a lien? What does it mean? What is its effects? The answer which we have in the brief is, that it "binds from its *teste*, certainly as against the defendant therein, and those claiming under him." This affords us but little aid, because the question is, how binds—the defendant? Does it divest him of his title? No. Does it divest him of the possession? No. Does it vest the title or the possession in the creditor, in the execution? No. Does it vest it in the officer? No. What then is this *lien*, which is so powerful for good and which it is so mischievous to disturb? The most that has ever been claimed for it is, that it prevents the debtor from selling. Well, has the debtor sold, or attempted to sell, here? Not at all. Then, where is the applicability of the doctrine of the lien, &c.?

Precisely, the same point which is made in this case, is *the* point in the case of *Horton* v. *McCall, at this Term*, in which it is decided, that the debtor is entitled to a homestead, notwithstanding the lien of the execution from its *teste.*

(167) And reference is made to that case, for the reasons, which it is unnecessary to repeat here.

It is again insisted, in this case, that the retroactive feature of the homestead law is in conflict with the Constitution of the United States—impairs the obligation of contracts. *Hill* v. *Kesler*, 63 N. C. R., is now so generally approved by a

hitherto doubting profession, and is so much in favor with all "laymen," that we would be lost to disturb it, if we doubted its correctness. Indeed, it is in such favor, that it was seriously proposed, to adopt it into the Constitution itself, lest it might be overruled. But we see no reason for disturbing it.

It is not necessary to notice the other points in the case, because we think the defendant is entitled to his homestead, and that is decisive.

No ERROR. Affirmed.

JOHN JOHNSON *v.* JOHN F. CROSS, Adm'r.

The personal property exemption, provided for by Art. X, of the Constitution and the laws, passed pursuant thereto, exists only during the life of the "homesteader"* and after his death passes to his personal representative, to be disposed of, in a due course of administration.

The case of *Watts* v. *Leggett, at this term,* cited and approved.

This was *a submission of a controversy without action* under Tit. XIV., chap. 1, of the C. C. P., heard before His Honor, Judge Pool, on the 12th day of December, 1870. The plaintiff obtained a judgment against Thomas E. Powell, who (168) had been his guardian, for a balance due on his guardian account, at Spring Term, 1867, of Pasquotank Court, and had caused executions to be regularly issued and kept up thereon, till after the death of Powell, which occurred in the early part of 1870, without his having made application for a personal property exemption.

The defendant administered and sold property, and it was conceded that he held $400, which was applicable to the plaintiff's judgment, unless the same can be claimed, by the minor children of said Powell.

The plaintiff had made a demand on the defendant, and the minor children of Powell had caused him to be notified, not to pay over the same, and that it was claimed by the said children, as "personal property exemption."

His Honor, on the foregoing "submission," entered judgment against the plaintiff, and he appealed.

*This term is in such universal use among the people, as expressing a debtor entitled to a homestead and personal property exemption, as to seem to justify its use. It saves a periphrasis, and it is justified by the rules philology, as the suffix "er" has an active signification, and signifies one, who does some act in reference to the thing expressed, by the word to which it is annexed.

The appeal was filed January Term, 1871, and argued, but an *advisari* was taken, until the present term.

Smith, for the appellant.

I. The exemption of personal property is warranted, only by the Constitution, when applied for by the debtor, and does not apply when he dies without making such application. Const. of N. C., Art. 10.

The Act, (ch. 137, sec. 10,) of 1868–9, authorizing this, is not warranted by the Constitution.

II. The exemption, if allowable at the instance of children, must be of property of intestate set apart, but cannot reach the proceeds of sale in the administrator's hands, after he has sold. Same act, sec. 10.

No Counsel for the appellee.

PEARSON, C. J. Constitution, Art. X, Sec. 1. "The personal property of any resident of this State, to the (169) value of $500, to be selected by such resident, shall be exempted from sale under execution, or other final process of any court, issued for the collection of any debt."

Sec. 2. "Every homestead, and the dwelling, and buildings, used therewith, not exceeding in value $1,000, shall be exempted from sale, under execution, or other final process, obtained on any debt."

Sec. 3. "The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt, during the minority of his children, or any of them."

Sec. 5. "If the owner of a homestead die, leaving a widow, but no children, the widow shall have such homestead during her widowhood."

By sections 3 and 5, after the death of the owner of a *homestead*, the exemption is continued on, for the benefit of his children or widow.

There is no such provision in regard to the "*personal property exemption.*" The property of such resident, is exempted from sale under execution, or other final process of any court, issued for the collection of any debt. Manifestly, this has reference to an execution issued against such resident, or owner of personal property, and cannot, by a forced construction, be made to apply to a sale, by his executor, or adminis-

trator. Indeed, the difference between real and personal property, is so material,—one transitory and shifting, the other permanent and final, that the idea of letting the children of the owner enjoy it, after his death, during their minority, or, the minority of any one of them, or, if there be no children, of letting the widow enjoy it, during her widowhood; in the absence of any provision, for accounting for and paying over, what might chance to be on hand, at the expiration of these contingent events, seems to approach, the verge of absurdity.

If the case is to be governed by the provisions of the Constitution, there is no difficulty whatever. But, it was urged on the argument, that the children of Powell, are entitled to the fund, as a "personal property exemption," under (170) Acts of 1868–'69, ch. 137, sec. 10. An *advisari* was taken to consider of that matter. The section is in these words: "If any person, entitled to a homestead and personal property exemption, die, without having the same set apart, his widow, if he leave one, then his child and children, under the age of twenty-one years, if he leave such, may proceed to have said homestead and personal property exemption laid off to her, him, or them, according to the provisions of secs. 7 and 8 of this Act."

Sections 7 and 8 provide, for laying off the homestead and personal property exemption, in the lifetime of the party entitled thereto, "*as guaranteed by Art. X of the Constitution.*"

We have put a construction upon the section now under consideration, in *Watts* v. *Leggett*, and we adopt what is there said, as a part of this opinion. If the homestead had been laid off under sec. 7, and the personal property exemption, had been assessed, under sec. 8, in the lifetime of Powell, as guaranteed to him by Art. X of the Constitution, it is clear his children would have had no claims to the personal property exemption, for as we have seen, the Constitution only secures a benefit to the children and widow, in the homestead. It is hard to understand, how a provision, to prevent the widow and children from being prejudiced, by an omission to have an assignment in the lifetime of the party, under whom they derive the title, can be strained so as to have the effect of giving them greater benefit, than if the omission had not occurred. It cannot be supposed, that the effect of the statute is to go beyond the Constitution, for its professed purpose is to carry into effect the provisions of the Constitu-

tion, and to secure to the widow and children, the homestead and personal property exemption as guaranteed by the Constitution. The section 10, is very inartificially worded; the draftsman was evidently confused, by not attending to the distinction made in the Constitution, between the "homestead," and "the personal property exemption"; he seems to have supposed that the widow was first entitled; and if he (171) had no widow, then the children or minor children; whereas, it is not pretended, that the widow can claim "the personal property exemption," or even the homestead, if there be a child surviving.

This obscurity, however, is cleared away, by the reference to sections 7 and 8, in which reference is made to the benefit, "as guaranteed by the Constitution."

We are of opinion, that neither the widow, nor the children, can set up claim to the fund, although if anything, the claim of the widow by *implication*, under section 10 of the Act of 1868–'69, would be the strongest.

We are pleased to know from the facts set forth on the record, that our conclusion prevents a very great injustice in this particular case, for Powell, as the guardian of the plaintiff, betrayed his trust, and the friends of the children of Powell are much to blame for an attempt to benefit them, at the expence of one, who would thus be made the victim of their father's breach of trust; his sureties, on the guardian bond, being all insolvent.

Judgment reversed, and judgment on the case agreed, in favor of the plaintiff.

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(172) W. M. SUTTON AND WIFE *v.* J. A. J. ASKEW *et al.*

1. Previous to the statutes of 1866–'67, and 1868–'69, purporting to restore to married women the common law right of dower, the wife had only an *inchoate* right of dower in the lands of her husband, subject to be defeated at any time, by the husband's conveyance.
2. When land was acquired, and a marriage was contracted, previous to the statutes aforesaid, *held*, that these statutes cannot affect the rights of the husband, nor restrict his power of alienation, nor confer upon the wife any right of dower, which did not have before.
3. Whether it is competent for the General Assembly to give a married woman a right of dower in land acquired after the passage of the statutes referred to, although the marriage took place before that time. Quere?
4. An agreement to pay a married woman a certain sum of money for *her right of dower* in the land of her husband, when the land was

acquired, and the marriage was contracted before March 2d, 1867, is void against creditors, for want of consideration.

5. It would seem that before a married woman can set up her consent, as a consideration to support a contract, to give her a part of the purchase money for a tract of land, sold by her husband, it ought to appear that she had released her right of dower or covenanted against incumbrances; and. *quere*, whether, in any case, it could depend upon parol evidence, and, whether the contract must not be out in the deed, and appear to be fair and reasonable.

6. The distinction between a wife's right to a homestead and dower, and other matters connected with the subject, stated and fully discussed by Reade, Judge.

Dick and Rodman, JJ., dissenting.

This was a proceeding, under the 266th section of the C. C. P., to subject the property of a judgment debtor, had before Pool, Judge, at Fall Term, 1871, of Bertie Superior Court.

The facts were found by the Judge to be as follows: "The judgment-debtor, J. A J. Askew, in the year 1870, was the owner of two houses and lots, and a store-house, in Bertie county, and proposed to one Augustus Holley to borrow two thousand dollars, and to secure him in said loan, by (173) a deed of trust, upon said houses and lots. The said Holley was unwilling to take the security, unless the defendant, the wife of said Askew, would join in the conveyance with her husband. The defendant, Maria C. Askew, refused to join in the conveyance, unless she was compensated for releasing her right of dower and homestead. Whereupon, it was agreed, that if the said Maria C. Askew would join in the conveyance, she should have the balance of the money arising from the proceeds of the sale of the houses and lots, after paying Holley the principal and interest of his money. With this understanding, the deed was executed. The houses and lots were afterwards sold by the trustee, for $3,400, and out of the proceeds, the debt and interest to Holley, and the expenses of the trust, etc., were paid off and discharged.

The lots were sold on a credit, and the purchaser gave in part payment, two notes, one for $500, and one for $481. These two notes the trustees endorsed, without recourse, to the defendant, Maria C. Askew, in furtherance of the agreement, which had been made with her. All of the $481 note, with the concurrence of Maria C. Askew, had been collected and paid to the creditors of her husband, before the judgment of the plaintiff, except about $100, which was agreed to be paid. The other note of $500, was retained by the said

Maria C. Askew, and claimed as her property. The conveyance to Holley was made before the plaintiff's judgment was obtained. J. A. J. Askew and Maria C. Askew were married before January, 1867. The debt due the plaintiff was contracted previous to the making of the deed in trust. Upon this state of facts, the Court was of opinion, that the property, in the $500 note, was in Maria C. Askew, the defendant, and dismissed the proceedings and gave judgment against the plaintiff for costs. Plaintiff appealed from this judgment.

(174) *W. N. H. Smith*, for plaintiff.
D. A. Barnes, for defendants.

READE, J. The single question is, whether the act of 1868-'9, restoring to widows, their common law right of dower, *i. e.* dower in all the lands of which the husband was seized during coverture, prevents a husband from selling lands which he owned before the passage of the act, his marriage having been before the act. If the act has that effect, it must be because it gives the wife an inchoate right to dower, to be consummated upon the death of the husband, she surviving, and of which she cannot be deprived without her consent; for, certainly, before the act, it was never supposed that the husband could not sell his lands at pleasure, without the consent of his wife. If the act has that effect, then her consent in this case to the sale, was a sufficient consideration to support the agreement to give her a part of the sale-money. If the act had not that effect, then her consent was immaterial, and afforded no support to the agreement, to give her a part of the sale money, and therefore, as against creditors, the transaction was void. It is a dry question of law, and must be so considered; although it is admitted to be one of great importance, and by no means free from difficulty.

Since 1784, and until the act aforesaid, 1868–'69, a widow was entitled to dower in the lands only, of which the husband died seized and possessed, and, therefore, but few questions have arisen in our State in regard to dower-rights, and none probably in regard to inchoate dower-rights. But the important change which that act, 1868–'69, made, involves the subject in much uncertainty, and will breed much litigation. What adds to the uncertainty is, that the different States have different laws, in regard to dower, and the decisions in the State Courts are numerous and conflicting. Some

of the decisions holding, that acts like ours are retroactive, and others holding them to be prospective only. And the reasons, which would be proper in one case, are inconsiderately used in the other. Scribner on Dower, a late American work, reviews the statutes and decisions of the different States, and also the English authorities and by judi-
(175) cious comments, has endeavored to produce some order out of much confusion. But, speaking of the inchoate right of dower as property, he says: "A certain vagueness of expression, uniformly characterizes the discussion of the subject, and, these discussions are commonly attended with unsatisfactory results." And so, we see, that this great right, favored like life and liberty, instead of being as it ought to be, and as until lately it has been, so plain, that he that runs may read, is now involved in much confusion, by inconsiderate legislation and conflicting adjudications.

It has been much discussed, whether marriage is a contract, or an institution, or a sacrement, or all combined; and especially whether dower results from the contract of marriage, or from the operation of law. Suppose it to result from the contract of marriage; then it is discussed whether the Legislature can change the law of dower, without impairing the obligation of contracts. Suppose it to result from the operation of law; then it is discussed whether the Legislature can change it without interfering with vested rights, and whether the law cannot change, modify, increase or abolish it. Those who claim to be up with the chivalry of the age, and while the Legislatures are liberally *enlarging* the dower-right, insist, that the Legislature have full power over the subject. But suppose upon some occasion, when the chivalric element may less prevail in legislation, they should *curtail*, or even *destroy* the right; how then? And if the dower-right is so frail that a widow may be deprived of it without her consent, how was her consent to the deed in this case important, even supposing the act to be retroactive; and if not important, then it was no consideration, and, if no consideration, then the contract was void. So that the agreement is suicidal. If the right to dower is at the mercy of the Legislature, to increase or diminish, continue or destroy, then it is nothing—nothing as a right—nothing as property! We think that this great right, sacred as life, and indispensable to society and the family economy, ought to

be more secure, ought to be inviolable, when once it
(176) exists, whether it be created by contract, or by operation of law. And we, by no means, subscribe to the doctrine that a right vested by operation of law, is less inviolable than when it arises from contract, when once it exists, no matter how it is inviolable. Nor is it true, that, in any conceivable case, private property can be taken for public use, or, as is said in this case, for the "paramount public good," without just compensation.

Our conclusion from what has been said, is, that before the late act, a widow was entitled to dower in such lands as the husband should die seized and possessed of, and in no other; that the right to be so endowed commenced, (whether by the contract of marriage, or by operation of law, makes no difference) at the time of the marriage, but subject to the husband's power of sale, and contingent upon his not selling it, and upon her surviving him, and that the Legislature could not deprive her of that right, or in any way change it without her consent. The Act of 1868-'69, comes in and changes the law of dower, so as to give the widow dower, not only in all the husband owns at the time of his death, but in all that he owned during coverture, but this act does not affect rights, or marriages, which existed *before* its passage; they stand as they did before the act, when the husband could sell without the consent of the wife; and, therefore, the consent of the wife, as in this case, was immaterial, and afforded no consideration to support the contract.

We have not overlooked the fact, that the deed in this case does not profess to release the wife's dower-right, if she has any, or to covenant against the incumbrance of dower; because, under the view which we have presented, it is not necessary. But it would seem, that before the widow can set up her consent as a consideration to support a contract, to give her a part of the sale money, it ought to appear that she had
released her dower-right, or covenanted against the
(177) incumbrance; and, *quere*, whether in any case, it could depend upon parol evidence, and whether the contract must not be set out in the deed, and appear to be fair and reasonable?

All this is said, but with little consideration as to the rights of the husband. But has the husband no rights which are entitled to respect, and which the Legislature cannot destroy! Before the late Act, when a married, owning land,

his wife had an inchoate right to dower, contingent upon his not conveying it away in his life time, and upon her surviving him, precisely the same as if it had been conveyed to him by deed from another, with such stipulation and conditions. Suppose it had been so conveyed to him, could the Legislature step in and alter his title, or change the conditions? No one will so contend. Well, what matters it how his title was derived, and how the conditions and stipulations came about, so that in fact they existed? Here then was the simple case of a man owning a tract of land, absolutely and in fee simple, with full power to sell the same, subject only to the condition that if he did not sell it, and should die seized and possessed of it, his wife should have dower; and the Legislature steps in and forbids him to sell, compels him to hold it as long as he lives, and gives his wife dower in it, in spite of him. If this be not depriving him of his vested rights, taking his property from him, and giving it to another, under the notion, as is said, of the "paramount public good," without compensation, then we cannot understand what would be an instance of such a violation of the rights of property.

It would probably be no great hardship upon the husband, married before the Act, and it would probably not interfere with his vested rights, to allow the Act to operate upon all lands *acquired after* the passage of the Act, because he would have notice of the incumbrance which would attach, and he would take it *cum onere*. But, as to this, we give no opinion.

And so it may be, that in all cases of marriages since the
(178) passage of the Act, the wife may refuse to join in the conveyance, unless she is compensated; and an agreement to give a part of the sale-money for her consent to the sale may be good, her dower-right attaching to *all* the lands of her husband, and contingent only on her surviving him; a reasonable probability, and not a mere possibility. And, *quere*, whether the Legislature, by any subsequent Act, can deprive her of this right. But these questions are not before us.

II. If the dower-right did not afford a sufficient consideration to support the agreement to give the wife a part of the sale-money, then in the second place, it is insisted, that her homestead right did.

There is this difference in the dower Act, and the homestead Act—the homestead Act, applies only to the homestead, used in the sense of the home, or dwelling house, whether

actually set apart or not; or the homestead, after it is set apart, upon proceedings had for that purpose.

The lands is question had not been set apart as a homestead upon proceedings instituted for that purpose, and it is not distinctly stated that they were the homestead or dwelling in the general sense. The case describes them as "two houses and lots, one a store-house." There is nothing in this to indicate that they were the homestead. Nor is there anything to indicate whether the husband did not have other lands and whether he did have lands which he had used, or which, after this sale, he did not intend to use as a homestead. Nor is it stated whether he was insolvent. Nor is it stated whether he had children. Nor does it appear from the case stated, nor from the deed, nor in any other way, what was the estimate put upon her homestead right. Nor is there any covenant in the deed against the homestead right, nor is there any release. And surely it cannot be, under the most liberal construction of the homestead Act, that the wife is entitled to have her homestead taken out of every tract of land the husband may own, and may wish to sell! It is true, that by reference to the deed, we find that, in describing the lots, it is said, "one being the house and lot upon which we reside," and that is (179) all; and whether temporarily or permanently, or whether he had not another which he had adopted, or intended to adopt, as a homestead, is not said. And both lots are put together, and her homestead right claimed in one as much as the other. No price being fixed upon either, and no estimate of the value of her homestead. So that, if, hereafter she should claim a homestead in other lands, there is nothing in the transaction to estop her, or even to show how much she has received in the way of her homestead-right in this transaction, so as to deduct it from any subsequent claim. So we think that as the case appears to us, she has made out no homestead claim, the surrender of which, was a sufficient consideration to support the agreement.

We have not overlooked the fact, that the provisions in the Constitution and in the Homestead Act, giving to widows homestead rights, seem not to be precisely the same. The Constitution seems to contemplate that the widow should have a homestead only in the event, that there were no children, while the Act seems to prefer the widow to the children. If there is a conflict in the provisions, it would seem that the

constitutional provision should prevail. But we do not decide the question, because it is not necessary.

There is error. And judgment would be rendered here for the plaintiff, but it does not appear what amount is due from Sessoms so that this opinion must be certified to the Court below to the end that the amount of the indebtedness of Sessoms be ascertained, and judgment for that amount, or for so much less as may be necessary to satisfy the judgment of the plaintiff against J. A. J. Askew, be rendered against Sessoms in the Court below.

DICK, J., *dissenting:* This is a proceeding by a creditor, under C. C. P, sec. 266, to subject the property of a judgment debtor in the hands of a third person, to the payment
(180) of a judgment debt. The facts presented by the case are substantially as follows.

The judgment-debtor, J. A. J. Askew, was much indebted, and desired to free himself from such embarrassment, and he applied to A. J. Holly to borrow money for that purpose.

Holly agreed to furnish two thousand dollars, if Askew and wife Maria C. Askew, would join in executing a deed in trust to him, for certain houses and lots belonging to J. A. J. Askew, to secure the payment of the money loaned.

Maria C Askew "absolutely and positively" refused to join in the conveyance, unless she received some compensation for her right of dower and homestead in the said lands of her husband. It was then agreed, that if she would execute the deed in trust, so as to convey her said interest, she should receive in consideration of her relinquishment of the right of dower and homestead, the balance of the purchase money for which said house and lots might be sold, after paying off Holly, the debt secured in the trust. The houses and lots sold for thirty-four hundred dollars, and all the money was paid out in discharging the debts of the husband, except a note of five hundred dollars, which the trustee placed in the hands of Maria C. Askew in accordance with the agreement above stated. All of these transactions were completed before judgment was obtained by the plaintiff, against said J. A. J. Askew, and the object of this proceeding is to subject said note, in the hands of Maria C. Askew, to the payment of said judgment.

The first question presented, is whether the agreement, between the said husband and wife, was founded upon suffi-

cient consideration to protect the property transferred to the wife against the claim of creditors.

If she had a contingent right of dower, the contract between them by which she received money or other property in consideration of her releasing such right in her husband's land, if reasonable, and fairly entered into, should be sustained. 2 Scribner on Dower, 8. *Ballard* v. *Briggs*, 7 Pickering, 533. *Quarles* v. *Lacy*, 4 Mump, 251.

The Act of 1868–'69, ch. 93, sec. 63, provides that,
(181) "Every married woman shall be entitled to one-third interest in value of all the lands, tenements and hereditaments whereof her husband is, or may be seized and possessed at any time during coverture," &c. It was admitted that Askew and wife were married before the passage of said Act, and that she was, at the time of the execution of the deed in trust, entitled to a contingent right of dower in the lands conveyed, unless the said Act is unconstitutional. It is insisted that the Act is unconstitutional as to antecedent marriages, for the reasons:

1. It impairs the obligation of the marrige contract.
2. It interferes with the vested right of the husband.

We will proceed in the first place to consider whether the right of dower proceeds from, and is a part of the marital contract, and then enter into the discussion of other questions involved in the case.

Dower is one of the institutions of society which has come down to us from a remote antiquity.

The right of a widow to a certain portion of the lands of her deceased husband for the term of her natural life, was unknown to the laws of the Greeks and Romans, and seems to have originated with the Teutonic races, who had a higher regard for woman than any of the earlier nations. Traces of this custom can be found in the first authentic records of Anglo Saxon history, and is the foundation of dower by particular custom.

The peculiar form of this right, known as dower at common law, is supposed, by an eminent jurist, to have been derived from the Danish law, established by Sweyn, King of Denmark, out of gratitude to the ladies of his realm, who sold their jewels, to ransom him from captivity. Originating thus, in feelings of gratitude, and the early spirit of chivalry, inspired by the self-denying kindness and generosity of woman, dower has always been a favorite of the common law;

secured in the earliest charters of English liberty, and recognized with favor even in *Magna Carta*. It is an estate
(182) for life, which the law gives to a widow for her support and maintenance, and as a home for the domestic duties and affections, and it has generally been regarded as a municipal regulation, established for the benefit of civil society. It is a gift of the law, and the right is not derived from the nuptial contract.

A man may deprive his children and kindred of his estate, by deed or devise, but he cannot dispose of that estate which the law, in its beneficence, gives to the widow. Even if he makes a devise to her, in lieu of dower, she may elect, whether she will take the gift of the husband, or the gift of the law, and she may have the value of both estates, ascertained, before she makes her election. In the case of the insolvency of the husband, the common law preserves dower as a *tabula in naufragio*, to keep the widow from sinking into poverty and distress. So great was the care shown to widows, that centuries ago, the maxim became prevalent "that the law favors three things: Life, Liberty and Dower." An instance, of this peculiar favor may be found in the early history of the common law, in dower *de la plus belle*, when the widow was endowed of lands, in socage, "as being the fairest portion of the lands, held by her deceased husband." This species of dower has long since passed away, with the military tenures in which it originated, but in most of the States of this country, where the doctrines of feudalism have never prevailed, the same kindly spirit of the law, gives the widow the mansion-house, as being the fairest portion of the estate, for her wants and purposes. When uses were introduced into England, they were not at first recognized by the common law, and were only enforced in the Court of Chancery, which, for a long period was under the control of ecclesiastics, who, in this Court, administered the principles of the civil law; and it was soon held that the dower, in a *use*, could not be allowed, as it would produce great inconvenience, and such a right was unknown in the system of civil jurisprudence.

This doctrine has now been abolished in England;
(183) and in a large number of the American States, a widow is entitled to dower in an equitable estate by express statutes.

The history of the common law shows, that dower was always regarded as a municipal institution, and was not the

result of a contract. There were two species of dower allowed by the common law, which, in some respects, were regarded as a part of a marriage contract. A husband *ad ostium ecclesiæ*, "after affiance made, and troth plighted," could endow his wife of a certain portion of his lands, to take effect upon his death. This was a kind of bridal gift, and in the time of Glanville the wife was obliged to accept it, in lieu of dower, but at a later period, according to Littleton, the wife, upon the death of her husband, might reject the gift and claim the gift of the common law. Dower *ex assensu patris*, resembled dower *ad ostium ecclesiæ*, and was, when a father seized of an estate in fee, allowed his son at the time of espousals, to endow his wife of a certain portion of such estate. Here then, were three parties to the contract, and the widow, on the death of her husband, might enter at once on the estate assigned, although the father was still living. The widow might also reject this *contract dower*, and claim dower at common law, of any lands of inheritance, which belonged to the husband during coverture. As these species of dower was voidable, at the will of the widow, they have, long since been abolished in England, and were never in use in this country.

The introduction of *uses*, and the doctrine that a widow was not dowable of a *use*, soon gave rise to the practice of making provision for a wife, by an ante-nuptial contract, called *jointure*, which was afterwards regulated by the statute of uses, and made a legal satisfaction of dower.

Thus, we see that dower at common law, has always been under the peculiar control of that system of jurisprudence, and this favoring care of widows, has been a marked feature in the institutions of every country, where the common law, has prevailed. This controlling influence of the com-
(184) mon law, in modern times, has made widows favorites, even in Courts of Equity, which in cases of difficulty about the assignment of dower, will exercise their extraordinary jurisdiction for the purpose of affording adequate relief. 1 Story Eq. Juris, ch. 12.

A reference to the law, regulating marriage, will show that the right of dower does not constitute a part of the contract. Marriage, as between the parties, is a personal contract, and, when entered into according to the rites of the country, where the parties are domiciled and the marriage is celebrated, will, by the comity of nations, be regarded as a valid contract in any part of Christendom. According to the general rule, the

terms of a contract, are governed by the *lex loci;* but this is not the case with marriage, except, as to the validity of the contract and the incidents resulting therefrom, are dependent upon the laws of the matrimonial domicil, and dower arises by the operation of the *lex rei sitæ.* Story on Con. of Laws, 380.

When persons, who are married in a country, where the common law does not prevail, afterwards become citizens of this State the wife will become entitled to dower, according to our law at the time of the husband's death. The converse of this proposition is equally true; that dower is not a part of the contract of marriage, but is an estate arising by operation of law, is well settled, both in this country, and in England. Mr. Scribner, in his valuable work on dower, 2 Vol., p. 2, says: the results of the English authorities is thus given by Mr. Park: "It will be observed, that this estate arises solely by operation of law, and not by force of any contract, express or implied, between the parties; it is the silent effect of the relation entered into by them, not, as in itself, incidental to the relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institutions of the municipal law." In *Norwood* v. *Morrow*, 4 Dev. & B, 442, Chief Justice Ruffin, in delivering the opinion of the Court, says: "There is no contract between husband (185) and wife for courtesy or dower. The interest the one gets in the property of the other, the law which gives for the encouragement of matrimony," "it is certain, that such as her estate (dower) is, the law makes it without any act of her husband, and against his will. See, also, *Rose* v. *Rose*, 63 N. C., 391. Marriage is not only a contract, but, it is an institution coeval with the first existence of the human race. It was ordained, and the first marriage ceremony was celebrated in Eden. It is an institution which is essential to the happiness of mankind, and, the preservation of human virtue. Without it, there can be no civilized society, or well regulated municipal government.

Marriage has therefore, in every enlightened system of government, been regulated by law, and must ever remain in some degree, under legislative control. For many purposes, marriage is a civil contract, and is so treated in courts of law, but the legislative power of the government regards it as an institution of civil society. The Legislature must necessarily have the authority to attach rights, incidents and

duties to this important relation, and modify and enlarge them, as the best interests of society and government may require; and all legislation on this subject must extend to all marriages, both antecedent and subsequent, in order to be uniform and general in its operation.

In regulating this institution, the common law declares that the effect of a marriage shall be to vest in the husband certain rights as to the wife's personal property in possession, the rents and profits of her real estate and her chattels real and choses in action; and in consideration of these benefits, he is required to take care of his wife, and if he is able, supply her with such things as may be necessary to her comfort in her condition in society. Immediately upon marriage, these rights become vested, and for most purposes, are protected in this State by the Constitution, and cannot generally be divested by subsequent legislation. These rights arise out of the marriage contract, not by any express agreement

(186) between the parties, but they are the result of positive law adopted by the legislative authority for the regulation of the marriage relation, as an institution of society. *Logan* v. *Simmons*, 1 Dev. & B., 13. There are certain incidents of marriage, as curtesy and dower, which do not arise from contract, as we have already seen, and they only become vested rights upon the happening of certain contingencies. By a positive rule of law, curtesy becomes a vested right upon the birth of issue capable of inheriting the estate of the wife, and dower does not become a vested right until the death of the husband.

As long as these incidents, created by law, remain in their inchoate condition, the Legislature may modify and enlarge them at will, as such action will not violate the contract of marriage, or, any vested right resulting therefrom. Cooley, C. L., 361; *Moore* v. *City of N. Y.*, 4 Seld., 110; 4 Wheaton, 500.

We will now consider whether the act of the Legislature, extending the former statute-dower to the common-law right of dower, and applying it to antecedent marriages, interferes with the vested rights of the husband, in his lands, within the meaning of our State Constitution.

If the act has this effect, he alone, has the right to complain, unless creditors or purchasers may have acquired some prior vested right. In the case before us it is not necessary to discuss the latter proposition.

Inchoate dower is a *quasi* incumbrance on the estate of the husband, and somewhat restricts his power of alienation, but this right of the wife, is a mere personal capacity, to take an estate upon a certain contingency, and is not a vested right which disseizes him of his freehold, or deprives him of his property within the meaning of the Constitution. This right of the wife takes effect prospectively—at the time of his death—and has only a contingent retroactive influence. A husband is under a legal and moral obligation to furnish adequate maintenance for his wife during his life, and the Legislature may, as a general municipal regulation, carry-
(187) ing out the moral obligations of marriage, make suitable provision for her support and comfort after his death. I readily admit that the Legislature cannot arbitrarily take the property of one person and give it to another for individual advantage, and that the private property of a citizen cannot be taken for ordinary public uses without just compensation; as for roads, public buildings, railroads, &c., as such uses, although public in their nature, are necessarily limited in their operation, and do not confer equal benefits upon all the people. But the paramount principle, which lies at the foundation of all government is, that the general public good is the supreme law, and individual rights and interests must at all times yield to its control. All men enter society, with the implied understanding, that the sovereign power is unlimited in regulating some of the great fundamental principles of the social compact, when its action is calculated to promote and secure the well being of the State.

The Legislature has the power of taxation necessary to support the government, of passing general laws as to the devolution and transfer of property, of regulating remedies in the courts, of abolishing imprisonment for debt, of passing statutes of limitation, of making homestead and personal property exemptions, and other similar remedial legislation. The right of alienation by deed and devise was conferred by statute, and such statute may be modified or enlarged, when the exigencies of society may require such alteration. In all such cases of the exercise of the powers of sovereignty, the maxim is *privatum incommodum publico bono pensatur.*

Surely, there has never been a time in the history of this country, more appropriate than the present, for a liberal exercise of the remedial powers of legislation for the general public good. *Hill* v. *Kesler*, 63 N. C., 437.

Marriage is an institution of civil society, and, the principles regulating it, form an essential part of the general public laws of every civilized community; and it would (188) be a very narrow view, in times like those through which we have passed, to regard it merely as an individual agreement, governed entirely by the strict technical rules of ordinary contracts. Marriage, in the contemplation of legislative power, is not a contract but a *status*. Parties cannot have a vested right of property in a domestic relation, therefore, the legislative act under consideration, does not come under condemnation, as, depriving parties of rights contrary to the law of the land. *Cooley*, 311.

The question of the legislative power upon this subject, has frequently been discussed in the courts, and has given rise to considerable conflict in judicial opinion, but, I think the weight of authority, reason and justice are in favor of the legislative power. Even, if we admit, that there is a reasonable doubt upon the subject, that doubt ought to be solved in favor of the legislative action.

The Legislature, in a free government, is the direct represenattive of the people, and, as such, may exercise all the powers of sovereignty, except so far as it is restrained by plain and express constitutional limitation, and, I think the judicial branch of the government ought not to declare a statute void, or restrict its operations, except in a clear case of an excess of legislative authority, or where it tends to the manifest detriment of the public good. In the matter before us, I think the legislative action ought to be sustained to its full extent, as, it but restores the time-honored custom of the common law, which is hallowed by the veneration of centuries, and is the law now existing in at least three-fourths of the governments, which are controlled by the descendants of the anglo-saxon race.

I cannot concur in the opinion of a majority of the Court.

JUSTICE RODMAN concurs with me in this opinion.

PER CURIAM. Error, to be certified.

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(189) WESSON & HUNTING *v.* THOMAS J. JOHNSON *et al.*

1. The Acts of the General Assembly, restoring to married women their common law right of dower, are unconstitutional, so far as they apply to marriages contracted prior to their passage.

2. Where a bill in equity was filed to foreclose a mortgage, and, a final decree was obtained, the defendant (the mortgagor), candot avail himself, by a suggestion, in the nature of a plea since the last continuance, of the pendency of another suit in the District Court of the United States, "to force him into bankruptcy."

3. For, 1st. It does not appear that both suits were for the same cause of action. 2d. A plea, *puis darrein continuance*, is not admissible in a Court of Equity. 3d. The case of a mortgagee is an exception to the general rule, and he may proceed on his mortgage, in *Equity*, and on his debt, at *Law*. 4th. The matter, which had existed so long, comes too late, after hearing and decree.

The case of *Sutton and wife* v. *Askew*, at this term, cited and approved.

This was a bill in equity, to foreclose a mortgage, heard before *Russell, Judge*, Fall Term, 1870, of Cumberland Superior Court.

This bill was filed against the defendant, Thomas J. Johnson, *alone*, afterwards his wife was made party defendant. The bill stated that the defendant was indebted to complainants in a large sum, and executed his note to them on the 27th day of March, 1867. That to secure the said debt, he executed a mortgage for a tract, or parcel of land in the town of Fayetteville, which deed bears date 27th March, 1867. That the note has not been paid according to the conditions of the mortgage, and prays for a decree of foreclosure and sale. The defendants answering, admit the execution of the mortgage, and that the debt has not been paid, but insists that, under the Act of the General Assembly of 1866–'67, ch. 54, the defendant, Ann M. Johnson, wife of Thomas J. Johnson, "became seized and possessed of one-third interest
(190) in all the lands of which her husband was seized during the coverture." That she did not sign the said deed, and that, according to the provisions of the Act above named, no title passed to the complainants.

The defendant, Ann M. Johnson, answering, insists upon her rights under the Act aforesaid—that the deed was made without her concurrence or assent, and she still refuses to consent thereto.

The defendant, T. J. Johnson, states, that he was married in the year 1834.

The cause was heard upon the bill and answer, at Fall Term, 1870, when a final decree was made, in favor of complainants, directing the land to be sold. And thereupon "the defendant pleads as a plea, since the last continuance, that these same plaintiffs instituted proceedings in bankruptcy in the District Court of the United States, returnable to Fall

Term, 1868, of said Court, to force him into bankruptcy, and he submits that the plaintiffs should elect which suit they will prosecute."

The Court "disregarded the entry of this plea upon the docket, and directed the decree to stand." From the decree of the Court, the defendants pray an appeal to the Supreme Court.

J. W. Hinsdale, for the plaintiff, filed the following brief:

I. The plea of "*autre action pendant*," is fatally defective, because:

1st. This plea can only be pleaded in the second action, but the equity suit was first begun.

2d. It does not appear that the suit in equity, and the involuntary proceedings in bankruptcy are for the same cause of action, and for the same purpose. Story Eq. Pl., secs. 737 and 738; Mitf. Eq. Pl, 246; Beame's Eq. Pl., 136; *Behrens* v. *Sieve King*, 2 Mylne and Craig, 602; 2 Chit. Eq. Dig., 1726, 1727; *Devie* v. *Brownlow*, 2 Dick, 64.

(191) 3rd. Where a bill seeks relief, and a defendant pleads "*autre action pendant*," the other suit must be either in the same or another Court of equity. Cooper Eq., Pl., 272, 276; Beams on Pleas, 134, 146, 148; Lord Raymond's Rep., 246; *Howell* v. *Waldson*, 2 Ch., cas., 85.

4th. The pendency of a suit in a court of the United States or a foreign court cannot be pleaded in abatement or bar to a suit *for the same cause* in a State court. 2 Mad., ch. 315; Mitf. Eq., Pl., 209; *Mitchell* v. *Bunce*, 2 Paige, 606; *Salmon* v. *Wooten*, 9 Dana, 424; 9 Johnson, 221; 12 *Ibid*, 99; 17 *Ibid*, 221, 272; 14 Vesey, 307.

5th. The defence is not made in apt time, it should be made before the hearing. *Harell* v. *Van Buren*, 3 Edw., 20; 1 Chit., Pl., 658, 659.

II. The "Act to restore the common law right of dower to married women," does not affect the present case. It can operate upon those marriages only, contracted subsequently to its passage, for,

1. It is a general and wise rule, to give to statutes a prospective operation. *Sackett* v. *Andross*, 5 Hill, 327, and cases there cited; Broom's Maxims, 33, and cases there cited; Smith on Stat. & Const. Construction, ch. 5; Dwarris on Stat. and Const. (Ed. of 1871), 162; Cool. Con. Lim., 370, and cases there cited; Sedgwick on Stat. & Const. Law, 190.

2. This act, if held to operate retrospectively, is unconstitutional.

3. It impairs the obligation of a contract. Marriage is civil contract, and the rights growing out of it, are entitled to the protection of the constitution of the United States. *Dartmouth College case*, 4 Wheat, 694; *Lawrence* v. *Miller*, 2 N. Y., 250; *Taylor* v. *Porter*, 4 Hill, 140; *Matter of Albany St.*, 11 Wend,, 149; *Fletcher* v. *Peck*, 6 Cranch., 87; *Green* v. *Biddle*, 8 Wheat, 92; *Ogden* v. *Saunders*, 12 Wheat, 200; *Bronson* v. *Kinzie*, 1 How., 311 · *McCracken* v. *Hayward*, 2 How., 608; Sedg. on Stat. and Const. Law, 638; *Holmes* v. *Holmes*, 4 Barb., 296. At common law, the right of dower at-
(192) tached, in favor of the wife, at the instant of the marriage, and could not be defeated by the alienation of the husband. 1 Cruise Dig., 136. So by the marriage and seizin of the husband the wife's right to dower, became a vested right under the marriage contract, and could not be impaired by subsequent legislation.

Kelly v. *Harrison*, 2 John cas., 20. See Stat., 3–4, Wm. IV., ch. 105, which recognizes this principle. Williams on Real Prop., 171; *Burk* v. *Basson*, 8 Cl'k, (Iowa,) 132. The law cannot take away dower. *Royston* v. *Royston*, 21 Geo., 161; *Holmes* v. *Holmes*, Barb., 295; Cool. Con. Lim., 284. Therefore, as the contract of marriage is mutual, and the rights arising therefrom, reciprocal, it follows, that if dower cannot be diminished to the prejudice of the wife, it cannot be augmented to the detriment of the husband. Cool. Con. Lim., 285.

Wm. McL. McKay for the defendants.

DICK, J. In *Sutton and wife* v. *Askew*, at this term, this Court decides that the Statutes restoring to married women the common law right of dower, are unconstitutional, so far as they apply to marriages contracted previous to the passage of those statutes.

As the *feme* defendant was married, before the enactment of those statutes, she had no interest in the lands conveyed to the plaintiffs.

The suggestion of the defendant, in the nature of a plea since the last continuance, that the plaintiffs are prosecuting a suit against him in the Court of Bankruptcy, cannot be made available, either as a plea, or as a foundation for a motion to force the plaintiffs to elect, in which Court, they will pursue their remedy.

1st. It does not appear that both suits are for the same cause of action.

2nd. A plea *puis darrein continuance* is not admissible in a Court of Equity; its effect, may be obtained, by means of a cross-bill. 1 Dan. Ch. Pr., 681.

(193) 3rd. The case of a mortgagee, is an exception to the general rule, and he may proceed on his mortgage in equity, and on his bond, at law, at the same time. Danl. C. P., 962.

4th The matter, which had existed so long comes too late after hearing and decree.

The proceedings in bankruptcy cannot operate in suspension in this suit, as in cases of involuntary bankruptcy, an application for the stay of a pending suit in another Court, cannot be made, until the order of adjudication is proved. Bump on Bank, 332.

Judgment affirmed.

JOHN N. BUNTING *v.* JESSE FOY.

1. When a demurrer is filed for want of a proper party, and from the facts presented by the pleadings, as in this case, the matter is left in doubt, the Court cannot render judgment, but must remand the cause.
2. Where a contract was made for the sale of land, and a bond was given, to make title upon the payment of the purchase-money, and a portion of the purchase-money being unpaid, an action was brought by the vendor against the vendee, to sell the lands for payment of the balance due; *held*, that in such action, the wife of the vendee was not a proper party, if the marriage took place prior to March 2d, 1867; *aliter*, if the marriage took place subsequent to that time.
3. The wife of a purchaser, who holds lands under a bond for title, has a contingent right of dower to the extent of the payments made by her husband.

The cases of *Sutton and wife* v. *Askew*, at this term, and *Thompson* v. *Thompson*, 1 Jones, 430, cited and approved.

This was a civil action, tried before Watts, Judge, at a special term of Wake Superior Court, January, 1872.

The complaint alleges that the plaintiff had agreed to sell to the defendant, a lot in the city of Raleigh. That (194) the defendant executed to him, several notes, in consideration of said agreement. That plaintiff executed a bond, binding himself to make a deed to the defendant, upon the payment of the purchase-money. That a portion of said purchase-money was paid, but there is a balance due

of over $300. That plaintiff demanded the money and proffered to make a deed whenever the same was paid. He demanded judgment for the purchase money, and in default thereof, an order of sale for the said lot, &c. Defendant demurs, and assigns as cause, that defendant is a married man, and that his wife is living, and ought to have been made a party to this action. The case, by consent, was referred to Hon. W. H. Battle.

Judge Battle made a report to the special term in January, 1872. He finds, as a fact, among other things, that when the contract between plaintiff and defendant was made, the defendant was a married man, and that his wife was living, and as a matter of law, that she ought to have been made a party to this suit. There was an exception to this part of the report. The exception was sustained, and the defendant appealed. The above is the only part of Judge Battle's report necessary to be given to understand the decision of the Court.

Batchelor, for plaintiff.
Phillips & Merrimon, for defendant.

RODMAN, J. The only question presented to us, is, whether the wife of the defendant is a necessary party. We are unable to decide it, because it is not anywhere stated whether the defendant married after or before 1866. We agree, with the referee, that the wife has a contingent right to dower, to the extent of the payments, made by her husband. *Thompson* v. *Thompson*, 1 Jones, 430, cited by referee. If, however, she married before 1866, the case of *Sutton* v. *Askew* decided at this term, excludes her, from the benefit of that and subsequent acts, restoring the common law right of dow-
(195) er, and, a sale by or against her husband will defeat her claim, which is confined to estates, of which, he shall die seized. If, however, she married after 1866, then, we think, she ought to be a party, on the authority of the case cited by Mr. Phillips, *Mills* v. *Van Voorhees*, 20 N. Y. Court of Appeals, 412. Under these circumstances, we can only reverse the judgment below and remand the case, to be proceeded in, according to law, which is accordingly ordered.

REVERSED.

SUSAN FELTON *v.* WILLIAM L. ELLIOTT *et al.*

1. A claim for dower, under the Act of 1867, set up in 1872, the husband being still alive, cannot be sustained.
2. A demand for dower is a special proceeding returnable before the Clerk.
3. On appeal to this Court, an undertaking of appeal, must be sent up with the transcript.

The case of *Webber* v. *Taylor*, at this Term, cited and approved.

This was an appeal from the decision of His Honor Judge Pool, rendered at Fall Term, 1871, of Perquimans Superior Court.

In 1866 the defendants recovered a judgment against Wm. Felton, the present husband of the plaintiff; execution issued thereon and a levy was made on the land in question; this execution was returned and writs of *ven. ex.* were regularly issued and kept up until a sale thereunder; the land was sold, it does not appear clearly from the record, when; but it is to be inferred, after the passage of the Act of 1866–'67, ch. 54, concerning dower; the husband of the plaintiff having given consent thereto in writing; the defendants purchased and went into possession and refused to lay off the

(196) plaintiff "one-third" of the land.

The plaintiff commenced her action 5th May, 1871, by a summons for relief, returnable to term time. His Honor, being of opinion with the defendants, gave judgment accordingly, and the plaintiff appealed.

The plaintiff sued *in forma pauperis* and on certificate of counsel, etc., His Honor allowed her to appeal without giving the usual undertaking for costs.

Ovide Dupree, for the appellant.
Gilliam, for the appellee.

PEARSON, C. J. The judgment in the Court below is affirmed, and the appeal dismissed for three reasons:

I. The summons issued 5th May, 1871, and demands dower under the Act ratified 2d March, 1867, which act is repealed by Act 1868–'69 (page 217). The case cannot fall under the last act concerning dower, for the husband is still alive.

II. The proceeding is commenced by summons returnable before the Judge in term time, whereas, being a "special proceeding" for dower, it ought to have been made returnable before the Clerk.

III. The appeal is allowed without a prosecution bond, the plaintiff being allowed to sue *in forma pauperis*. C. C. P., sec. 303: "To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant," etc. See *Webber* v. *Taylor*, at this Term.

Judgment affirmed. Appeal dismissed.

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(197) JOHN WATTS, Adm'r of John L. Leggett *v.* JAMES LEGGETT *et al.*

1. Upon the death of a man seized in fee of land, leaving a widow and minor children, without having had a homestead laid off, the double rights of dower and homestead, do not attach together *simul et semel*, either in the widow or widow and children, but dower having been assigned to the widow, the children are only entitled to a homestead *sub modo*, i. e., a present interest of the enjoyment of which is postponed until after the death of the dowress.

2. The manifest purpose of the Act of 1868-'69, chap. 137, is to prevent the widow and minor children from being prejudiced by the omission of one entitled to a homestead, to cause it to be laid off in his lifetime. It cannot be supposed that the effect of the statute is to go beyond the Constitution, when its professed object is to carry into effect its provisions.

RODMAN, J., *dissentiente.*

This was a special proceeding instituted by the plaintiff as administrator of one John Leggett, against his widow and minor children to obtain a license to sell the real estate of which the intestate had died seized, subject to the dower of the widow which had been assigned. The intestate had not procured a homestead to be laid off in his life, and now the widow and children claim a homestead over and above the dower assigned to the widow, and the cause coming on for hearing before His Honor, Judge Moore, at Chambers, on the 5th day of September, 1871.

His Honor decided in favor of their claim, and the plaintiff appealed.

H. A. Gilliam, and *Battle & Sons*, for the plaintiff.

No counsel for the defendant.

PEARSON, C. J. Constitution, Art. X, sec. 1: "The personal property of residents of this State, to the value of $500," is exempted from sale under execution for any debt.

Sec. 2. "*Every homestead*, and the *dwelling and build-*
(198) *ings used therewith*, not exceeding in value $1,000," is exempted from sale, under execution for any debt.

Sec. 3. "The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children or any one of them."

Sec. 5. "If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt, from the debts of her husband, and the rents and profits thereof shall enure to her benefit during her widowhood, unless she shall be the owner of a homestead in her own right."

Sec. 6, secures to the separate use of the wife, all the real and personal estate, whether acquired before or after the marriage.

Act 1868–'69, chap. 137, entitled "An Act to lay off the homestead and personal property exemption."

Sec. 7 "Whenever any resident of this State may desire to take the benefit of the homestead and personal property exemption, *as guaranteed by article ten of the Constitution of this State*, such resident shall apply to any justice of the peace," etc.

If the homestad had been laid off in the lifetime of the husband, according to the Constitution, it would have been so laid off as to include the homestead (that is *the place at which he had his home*) and the dwelling and buildings used therewith. Act 1869–'70, ch. 176, entitled "Procedure to obtain dower," sec. 2. "Every married woman shall be entitled to one-third in value of all the lands, etc., whereof her husband was seized at any time during coverture, "in which third part shall be included the *dwelling house in which her husband usually resided*, together with the offices, outhouses and buildings and other improvements thereto belonging or appertaining." In other words, as expressed in the Constitution, "The homestead and the dwelling and buildings used therewith.

If the homestead had been laid off, in the life-time
(199) of the husband, at his death the dower of the wife would have been assigned so as to include the dwelling-house, in which the husband had usually resided, and buildings used therewith. Thus the dower would be assigned so as to include the homestead or a part thereof, and the right of dower having attached at the time of the marriage, would have been paramount, and the right of the children to enjoy the homestead during the minority of any one of them, must have been taken subject to this paramount right of dower; the effect being to postpone the enjoyment of the

children, as to so much of the homestead as is covered by the dower, until the death of the widow; leaving them of course, to the present enjoyment of such part of the homestead and land, appertaining thereto, as is not covered by the dower.

The question is, does that make a difference, or are the rights of the widow and children to be treated in the same way, as if the husband and father had not neglected to have his homestead laid off in his life-time?

That depends upon the proper construction of sec 10 of the Acts of 1868–'69, ch. 137: "If any person entitled to a homestead and personal property exemption, die, without having the same set apart, his widow, if he leave one, then his child and children under the age of twenty-one years, if he leave such, may proceed to have said homestead and personal property exemption, laid off to her, him or them, according to the provisions of sections seven and eight of this Act."

A perusal of the statute, makes it manifest that the purpose of this section is to prevent the widow and children from being prejudiced, by the omission of one entitled to a homestead and personal property exemption, to have it laid off in his life time, so as to secure to them the benefit of the homestead and personal property exemption, as guaranteed by Art. X, of the Constitution. Indeed, this section, in so many words, provides that the property shall be laid off to him, her or them, according to the provisions of sections seven and eight.

We have seen how it would have been if the home-
(200) stead had been laid off according to the provisions of section 7. It is hard to understand, how a provision to prevent the widow and children from being prejudiced by an omision to have the assignment in the life-time of the party entitled, can be strained so as to have the effect of giving them greater advantage, than if the omission had not occurred on the part of one under whom the widow and children derive their title. The Constitution makes "the relief of the debtor," its primary purpose, and the benefit to the widow and minor children, comes in merely as an incident. It cannot be supposed that the effect of the statute is to go beyond the Constitution, for its professed purpose is to carry into effect the provisions of the Constitution, and to secure the homestead and personal property exemption, as guaranteed by Art. X, of the Constitution."

Judgment reversed. This opinion will be certified to the end that a homestead may be laid off, as if it had been done in the life-time of the deceased, so as to include the homestead, dwellings and buildings where he usually resided, to be enjoyed subject to the dower.

RODMAN, J., *dissenting.* I regret to differ from my associates, and my respect for them, and the great importance of the decision to the orphaned poor of the State, require me to give, as briefly as I can, the reasons for my difference.

The third section of Art. X, of the Constitution, certainly intends that the children shall have a homestead after their father's death, whether it was laid off before or not; and it contemplates that their right shall be paramount, to that of the widow, to a homestead though not to her dower; for, by the Constitution the legislature is not *required* to give her a homestead in a case where there are no children, (Sec. 5). The Act of 1868–'69 does, however, give her one whether there are children or not. And I think it may lawfully do so, provided it does not impair the right of the children to a homestead; and I think it is a false construction of that act, which makes it rob the orphans, instead of the widow,
(201) for the benefit of the creditors of the deceased. If this be the true construction and necessary effect of the act, I should say it was void, as a palpable violation of sec. 5, of Art. X, of the Constitution. I do not think that a reasonable construction of the act will give it any such effect. But before I proceed to expose what I consider to be the radical fallacy on which that construction rests, I wish to follow out that construction in some of its practical workings, and it will be seen that, in the great majority of cases where there is a widow and children, it defeats, so far as the children are concerned, the beneficent intent of the Homestead Article of the Constitution, which many have thought the best Article in it.

I will suppose that the widow is, in all cases, entitled to her dower; although, if the principle of *Sutton* v. *Askew*, decided at this Term, is adhered to, it may be extremely doubtful whether, when a husband has his homestead laid off during his life, he can be said to die seized of any estate, of which his widow (if the marriage took place before 1866) is entitled to dower. But I pass over this, and suppose the widow entitled to dower and also to a homestead. I believe it is agreed that she is not entitled to both, but only to either, at her election.

If the real estate of the deceased is worth $3,000—it is indifferent to her whether she takes dower or homestead, and the consequences, to the children, will be the same. If the estate be worth less than $3,000, she will elect to take the homestead, and, in every such case, the children get nothing in the homestead during the life of the wife.

Now, the assumption of the majority of the Court, and the sole argument on which it can pretend to stand, as I conceive, is this—that because the homestead, if it had been laid off in the life-time of the husband and father, must have included the dwelling; *therefore*, whenever it is laid off after his death, and for whomsoever it is laid off, it must include the dwelling; and *therefore*, must be laid off for the widow and for the children on exactly the same adjacent land; and *there-*
(202) *fore*, the widow claiming a homestead in lieu of dower, which, it is admitted is a paramount right, must take paramount to the children, who thus get nothing during her life. So, by this construction of an act, intended to carry out the Constitution, and certainly not to violate or override it, the widow, who is not contemplated by the Constitution as an object of favor, except where there are no children, is made to supplant the children and turn them out of doors.

It may be said, however, that in the case now before us, the widow does not claim her homestead but her dower, so that the cases and consequences, I have supposed, are not to the point. Let us see, then, the consequences to which this construction of the Act leads, when the widow sets up her claim to dower, and the children theirs to a homestead. The false theory is still applied, and with a more absurd, if less injurious, result. If the estate of the deceased be worth $3,000 or over, the dower of the widow equals, or exceeds the homestead of the children, so that, upon the idea that the last must necessarily be lapped upon the first, the children get nothing during the life of the widow. If the estate be less than $3,000, as the widow by her dower gets a life-estate in land worth less than $1,000, the children get a homestead in the difference between her dower and the $1,000, which difference is the value of their homestead. If the estate be worth $1,000, the widow's dower being $333⅓, the children would take a homestead to the value of $666. If the estate be worth $300, the children will take a homestead in an estate worth $200. So this is the result of the legal construction of the Act of 1868–'69, that the larger the estate of the

deceased is, the less do his children get; and if they are unfortunate enough to have a father whose land is worth $3,000, they get nothing until after the widow's death, whereas, if he was worth only one-tenth of that sum, they get a homestead in $200 during her life-time, and in another $100 at her death, during their non-age. Such absurd results furnish the strongest argument against the construction
(203) of the statute decided on by the majority of the court. Surely no sane Legislature ever intended this. It would hardly be respectful to impute such an actual intention. I proceed now, to examine the reasons for this construction of the Act of 1868–'69. They are these, and no others are or can be possibly asssigned of the slightest weight or value. The Constitution (Art. X, sec. 2,) says that *the homestead shall include "the dwelling and buildings used therewith*, not exceeding in value $1,000, to be selected by the owner thereof, &c." The Act of 1868–'69, ch. 137, sec 1, says that when the estate of any resident of the State shall be levied on, such portion thereof as he actually occupies as a homestead, or "as he may elect to regard as such, *including the dwelling and buildings thereon*, shall be exempt from such levy, &c."

Section 7 says, that when a resident desires to have a homestead laid off, he shall apply to a Justice, who shall appoint three persons to lay it off, "*according to the applicant's directions*, not to exceed $1,000 in value, &c." Section 10, provides that if any person entitled to a homestead dies without having had it laid off, his widow, ("or if no widow," I suppose was evidently omitted) then his child, may have a homestead laid off *according to section 7*.

The dower Acts of 1866–'67, 1868–'69, and of 1869–'70, all allow or require the widow's dower, to be so laid off as to include the dwelling-house.

Upon these statutes, which are construed as absolutely requiring both the widow's dower, and the children's homestead to include the dwelling-house, &c., the conclusion is drawn not only that the two rights must lap as to the dwelling-house, but that they must lap in all other places, and whichever is greater, must include that which is less, and the children's homestead must be thus, in every case destroyed, *pro tanto* by the widow's dower.

Without looking for aid to the absurd and inequitable consequences to which, as we have seen, this construction

(204) of the Act leads, I deny, that there is any ground for the conclusion, that the two rights must necessarily lap to the detriment of the weaker, and that the homestead, must necessarily and under all circumstances include, the dwelling-house.

In the first place, although the Constitution says, that when a homestead is *laid off for the owner*, it shall include the dwelling, neither the Constitution nor the Act of 1868–'69, say so, when it is *to be laid off for the widow or children.* On the contrary, sec. 10, of the Act says, that when a widow or child desires a homestead laid off, it shall be laid off, *according to sec. 7*, and that section expressly says, it shall be laid off "*according to the applicant's directions.*"

But it is said, that section 7, says, "That whenever any resident of this State may desire to take the benefit of the homestead and personal property exemption *as guaranteed by Art. X of the Constitution of this State*, such resident, (or his agent or attorney) shall apply to any Justice of the Peace," &c.; and that this reference of section 10, to sec. 7, and of section 7 to the Constitution imports into section 10, the command, that the homestead of the children, shall, in all cases be laid off to include the dwelling-house and adjacent lands, and *not elsewhere.* It is, upon this long stretched and recondite connection of one section with another, and, of that, with the Constitution, and upon an illogical inference thereupon drawn, that the opinion of the Court, so disastrous to the children, entirely stands. Now, the various Acts in relation to dower have always required that it be so laid off as to include the dwelling-house. Yet was it ever contended that because there was no dwelling-house upon that land liable to dower, the dowress could not have her dower on lands where there was no dwelling? Surely not. If the husband's dwelling was upon land liable to her dower, it was included in the admeasurement; if it was on land in which he had no estate liable to dower, for example, a life estate or a term of years,
(205) the widow took her full dower upon other lands, on which there was no dwelling. Why is not this just and beneficent rule of the common law, which is applied for the benefit of the widow, applied in a parallel case, for the benefit of the orphan? When there is the same reason, there ought to be the same law. If there be no widow's dower or homestead to interefere, the homestead of the children ought to be laid off to include the dwelling. But if the widow's

dower has taken the dwelling, then it is the same as if there was land liable to the children's homestead, on which there is a dwelling, and it must of necessity, and, "*ut res magis valeat quam pereat*," be laid off on land where there is no dwelling, and thus, need not conflict or lap on the widow's dower. The whole theory of the necessary and innevitable lappage of the dower, and of the children's homestead, is, as it seems to me, destitute of foundation, in any principle of law. On the contrary, it is opposed to these received and honored rules of construction, by which full effect is given to the intention of a statute, when it appears, by reasonable intendment, and does not contravene any maxim of law

My learned colleagues have not said, and of course would not say, that it is not material for the children to have their homestead, if the mother has her dower, for, she will give them a home. The answer to this suggestion, if any should make it, is this, the law did not intend to give to the children of a deceased father the support of his widow's kindness. If that did not exist without the law, the law could not give it. Besides, the widow may marry again, and, the children be thus made homeless. Or she may be a second wife, and not their mother, and thus without the maternal feeling.

I cannot concur in that construction of an act, which was intended as beneficent and has been applauded as such, which takes out of it all beneficence to the children; which mades it give to them a shadow, instead of a substance; an estate to begin at the death of another, and to expire when they come of age, which is called, as if in mockery, a
(206) homestead sacred "from turret to foundation-stone;" a contingent homestead in a reversion, a house, beneath whose roof they may never sleep, and land, upon which they cannot tread without a trespass. That is neither the popular or the Constitutional idea of a homestead.

PER CURIAM. Judgment reversed.

L. H. DELLINGER *v.* A. G. TWEED.

A homestead and personal property exempton, under Art. X, of the Constitution and the laws passed in pursuance thereof, cannot be sold under an execution, issued upon a judgment rendered, in an action *ex delicto*.

PEARSON, C. J., and RODMAN, J., *dissentientibus*.

This was a civil action, tried on complaint and demurrer, before His Honor, Judge Cloud, at Fall Term, 1870, of the Superior Court of Yancey.

The complaint alleges, in substance, that the plaintiff had recovered judgment in an action for defamation against one McPeters, in the Superior Court of Yancey county, at Spring Term, 1869; that he caused execution to issue thereon, and, to be placed into the hands of the defendant, the Sheriff of Madison county, with a notification that the same was issued upon a judgment in a case of slander; that, notwithstanding, the said Sheriff had summoned appraisers, and caused a homestead to be laid off to McPeters, and returned that fact and *nihil ultra;* that McPeters had property amply sufficient to satisfy said execution, which the Sheriff neglects and refuses to sell—and then demands judgment, &c. To this complaint a demurrer was interposed, general in character, special in form. His Honor, on consideration, rendered judgment in favor of the defendant, and the plaintiff appealed. The appeal was argued at January Term, 1871, by

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Battle & Sons and *Malone*, for the plaintiff.
Ovide Dupree and *Batchelor*, for the defendant.

The Court took an *advisari* until June Term, 1871, when the cause was again argued.

Malone, for the plaintiff.

I. The homestead exemption is a privilege, and in analogy to the privilege of infancy, coverture and the like cannot be maintained against *tort*.

II. It was held in *Smith* v. *Owens*, 17 Wis., 395, that the word "liability" secures a homestead as against *tort*, as it curtails the meaning of the word "debt."

He also cited *State* v. *Melogue*, 9 Ind., 196.

Battle & Sons, for the plaintiff, filed the following brief:

1. In the interpretation of Constitutions, we are to presume that words have been employed in their natural and ordinary meaning. Cooley, C. L., 58 and 59.

2. The common law to be kept in view. *Ibid*, 60–61.

3. The same word to be understood in the same sense throughout. *Ibid*, 62.

Compare with Art. X, secs. 1 and 2. Art. I, secs. 6 and 16. Art. V, secs. 4 and 5. Art. VII, secs. 7 and 13. Art. VIII, sec. 4.

4. The word *debt* in the Constitution, understood by the General Assembly, which put the instrument into operation, in the restricted sense. Compare with sec. 16, Art. I, of the Constitution, sec. 149, Code Civil Procedure. Compare also secs. 1 and 26, chap. 59, Revised Code. Words *debt* (208) and *damages* used. Also, chap. 45, secs. 7 and 8; also chap. 61, sec. 3, and chaps. 63 and 64, Acts of 1866 and 1867, and Acts of 1858–'59, chap. 38.

5. Definition of *debt*, in Blackstone, is in Book 3, p. 154, *specific and restricted*, in Book 2, p. 464.

6. The purpose of the homestead exemption was to afford relief to the people of the State, then heavily in debt. The Legislature had been attempting to do the same thing, but was met by Constitutional difficulties See Acts of 1866–'67, above, and the several stay-laws.

Cooley, 65.

W. H. Bailey, having a similar case, appeared by courtesy, on the same side:

I. If homesteads are exempt from execution in actions *ex delicto*, the words, "issued for the collection of any debt," have *no value*. Lopp them off and the words left cover any execution, beyond all doubt. When added, therefore, it could not be to explain but to qualify.

II. In statutes, words are to be taken in their ordinary sense, and that sense had been well established by distinctions in General Orders, Stay-Laws, &c.

III. The history of the passage of Art. X: As first drafted it read, after the words as they now are, "*contracted* after the adoption of this Constitution," Con. Jour., 278: On 2d reading, delegate Graham, of Orange, proposed an amendment, *i. e.*, "that the General Assembly shall provide by law for the exemption, from sale, *under execution*, or other process, of a homestead," rejected, 33 to 61. See Jour., 283: On 3d reading, Mr. G. proposed to strike out the words, "issued for the collection of any debt," which was rejected—p. 347.

IV. The Art. X, &c., are, *in pari materia*, and, to a great

extent, follow the language and provisions, of the former homestead laws, 1858–'59 and 1866–'67, with this noticeable difference, viz.: the Act of '58, provided that the (209) homestead should not be subject to execution, "for any debt contracted, or, *cause of action*, arising, after the same is registered;" the Act of '67, enacts, "shall not be subject to execution, for any debt contracted, or cause of action, or other liability, &c., *General Order No.* 10, makes the exception universal. Yet with this previous legislation, the Convention restricted the exemption "issued for the collection of any debt contracted after,"—a tort contracted! Used inadvertently? The word "debt" was called to their attention four times, pp. 280, 283, 349.

V. The Acts of 1868 and 1868–'69, follow in the rut cut by the Convention, and are legislative contemporaneous constructions. *Hedgecock* v. *Davis*, 64 N. C., and in these acts the words "creditor" and "debtor" repeatedly occur.

VI. Analogies—construction of statutes to the effect that *tort* is not embraced by the term *debt*. Insolvent debtors act, *Woolard* v. *Dean*, 2 D. and B., 490; Attachment law (R. S.), *Mingus* v. *Zollicoffer*, 1 Ired., 178: Removal of debtors, *Booe* v. *Wilson*, 1 Jones, 182: 13th Eliz., *Worth* v. *Norcom*, 4 Ired., 202: Justice's jurisdiction, *State* v. *Alexander*, 4 Hawks, 182: *Clarke* v. *Dupree*, 2 Dev., 411. Bankrupt's estate. It cannot be proved—this is familiar learning.

VII. Contemporaneous legislation favorable to punishment of *torts*. Stay-laws did not embrace them. Slight trespasses were made indictable.

VIII. Decisions, in other States, on similar enactments: *Lathrop* v. *Singer*, 39 Barb. (N Y.), 396; *State* v. *Melogue*, 9 Ind., 196; *Davis* v. *Henson*, 29 Ga., 345; 1 Wash. R. P., 353.

Batchelor and Dupree, for the defendant.

The Court took another *advisari*, when, at the present term, the following opinions were delivered.

(210) READE, J. Hitherto, the only objection to homestead exemption has been, not that it violates the Constitution of the State—for it is in that instrument it is provided for—nor yet, that it violates public policy—for it is in universal favor—but, the objection has been, that it was in violation of the Constitution of the United States, which

forbids a State to pass a law which impairs the obligation of contracts.

This case steers clear of that objection, for here was no contract at all, but a *tort*. This case, therefore, involves nothing but a construction of our State Constitution, the rule in regard to which is, that we must seek for its meaning, by the consideration of its language, and its common acceptation, making sense.

If the object of the Constitution was to defeat creditors, it was a wicked purpose, and in conflict with the Constitution of the United States. If the purpose was to secure homesteads, then it was a commendable purpose, and quite within the power of the State. It is but common respect to the intelligence and virtue of the people, as assembled in Convention, to suppose that they intended to do the latter. The article upon the subject in the Constitution, is entitled "Homesteads and Exemptions;" and secures a homestead to every man who has one, and to his family without regard to his indebtedness. The object being, to establish homesteads, as institutions in the family economy, and in the interest of society. And if debts stand in the way, they must "go by the board," as anything else must, not by design, but incidentally. And yet it is amazingly common, to hear it discussed, whether it was *intended* to defeat this or that debt; whereas, it was intended to *defeat* nothing, but to secure a homestead. And, therefore, if a debt come in the way—that must give way; and if damages for torts come in the way—they must give way.

Against this view, it is objected that the words used are, "any debt," and that debt is necessarily founded on a contract. And, therefore, while the homestead cannot be
(211) sold under execution at all, yet, it may be sold under an execution obtained on a tort, or on damages.

To this it is answerered, that if the language of the Constitution is to be understood in the *technical* sense of the term used, then there is no homestead exemption at all; for it was never known that an execution issued, or was obtained upon a debt, or upon a contract, or upon a tort, or upon damages. An execution, in all cases, issues or is obtained upon a *judgment*. So that, instead of reading the Constitution as it is, "shall be exempted from sale under execution, or other final process, obtained any debt," we must read it as it must necessarily mean, to make sense, "shall be exempted

from sale under execution obtained on any *judgment*," or else we must hold a judgment to mean a debt, as clearly it does. And then the manifest intention will be carried out, that the homestead shall not be sold under execution at all, except in the cases named in the Constitution. But then, it is asked, if the Constitution means *judgment* instead of *debt*, why did it not say so? It may just as well be asked, if it meant contract, why did it not say so? It does say plainly enough, and expressly, that it shall not be sold under execution, and that was the main idea to which the Convention was advertent; and it was inadvertent in describing upon what the execution was to issue, as well it might be, because an execution cannot issue except upon a *judgment*.

We admit, that a plausible argument against this view, is founded, upon the impolicy of allowing a man to commit torts, with impunity. But we think, a still more plausible argument might be founded upon the impolicy of allowing a man to avoid debts with impunity. But the Constitution does neither. It has nothing to do with allowing men to commit torts, or to avoid debts. It looks away from these, not as favoring them, but to the paramount object of establishing homesteads.

Our attention has been called to decisions, in two or three sister States, where the homestead has been sustained,
(212) as against torts, and we know of no decision to the contrary.

No error. Affirmed.

PEARSON, C. J., *dissentiente*. The ruling, in *Hill* v. *Kesler*, that the words "any debt," as used in the Constitution, embrace pre-existing debts, as well as debts contracted after the adoption of the Constitution, certainly gives to the words their fullest extension. As to debts contracted afterwards, there was no difficulty, for a man in giving credit could have an eye to the existing state of things. As to pre-existing debts, there was very great difficulty. On the one hand, the prohibition of the Constitution of the United States, as to impairing the obligation of contracts — on the other, the necessity for relief, to a people who, by the loss of their slave property, and other consequences of the late disastrous war, were unable to pay their debts, without being deprived of the means of subsistence. Upon this latter view of the question, there has been a very general acquiescence, on the part

of the profession and of the people, in the decision made, by a majority of the Court. Certainly there has been no desire on the part of the Courts of the State, to disturb *Hill* v. *Kesler*. After these "two little words" had been allowed to have so large an effect, taking them in one sense, the attempt to press them again into service, for a different field of action, and, in a sense entirely different, so as to make them embrace damages for *tort*, and injuries caused by misfeasance, does not, as it seems to me, come with a very good grace. The ground of "a necessity for relief," which was the main consideration in *Hill* v. *Kesler*, has no application and there is no context or subjunctive words which can have the effect to extend the naked meaning of the word "debt"—for instance, in the Constitution of the State of Ohio, after the words "any debt," the words or "*other liabilities*" are superadded. Upon these latter words, the Court puts its construction, that the homestead is exempted from sale for damages assessed in actions for *tort*. There are no words to
(213) that effect, in the Constitution of the State of North Carolina, and the construction turns wholly upon the words "any debt," unaided by considerations of necessity, or any collateral matter.

The ordinary meaning of the word "debt," is, a sum of money due to another by contract. The relation of debtor and creditor implies, as of course, that the one has given credit to, that is, trusted the other, in a contract.

It is true, the word "debt" is sometime used in a broader sense. One pays a debt to nature when he dies; he pays a debt to justice when he is hung for murder; he pays a debt to the State, when fined for a misdemeanor; he pays a debt to the party injured by slander or other private wrong, when he satisfies the damages assessed by the jury.

I cannot bring my judgment to the conclusion, that the word is used by the Constitution in this broad and figurative sense. To give it that construction, will carry the remedy beyond the mischief, and, instead of providing home and the means of subsistence for unfortunate debtors, by putting a certain amount of property beyond the reach of creditors, to meet a pressing necessity growing out of the consequences of the war, the effect of the construction will be, to grant impunity to wilful wrongs and injuries to private rights, without any special necessity caused by the war, and thus make a most important change of the law, in respect to the

rights of person and rights of property, merely for the sake of making a change. If such was the purpose, every principle of construction, called for the use of plain and unequivocal words to express the intention.

There is another view of the subject entitled to much weight. This change in the law, will in nine cases out of ten, take from the party injured all civil remedy for redress; he is not obliged to trust any one hereafter, so as to become his creditor by contract, unless he may choose to do so, but, how can a man prevent another from uttering slander or seducing a daughter, or from instituting a malicious
(214) prosecution, if he has no mode of recovering damages? The only way to protect our good citizens from such injuries, would be, to provide a public remedy in the stead of the private remedy, by making all such injuries indictable as misdemeanors. In the absence of such a provision, the conclusion is forced upon me, that the Constitution did not mean to make so important a change, by which, every one is put at the mercy of the vicious and ill-disposed, and will be driven, in the absence of all protection, either by indictment or by civil action which can be made effectual, to take the law into his own hands.

RODMAN, Justice, concurs.

CLERK'S OFFICE *v.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF CAPE FEAR.

1. When an execution for costs, incurred in this Court, has been returned unsatisfied, and the party is insolvent and entitled to moneys, in the Clerk's office of this Court, *ordered*, that the office costs be deducted from the moneys so due to him.
2. Although such execution-debtor is adjudicated a bankrupt, it will not affect this conclusion, as the assignee, *quoad hoc*, takes subject to all the *equities* of the bankrupt.
3. The position and legal *status* of an assignee, discussed and explained by RODMAN, J.

The cases of *Clerk's Office* v. *Allen*, 7 Jones, 156, and *Carr* v. *Fearington*, 63 N. C., 560, cited and approved.

This was a motion by W. H. Bailey, attorney on behalf of the Clerk's Office, to order the Clerk to deduct from the amount of money belonging to the defendant in Court, the amount of a bill of costs against it, in favor of the
(215) officers of this Court.

It was admitted that the defendant is a bankrupt, and had been so declared, since the last term of this Court.

The facts were, that Nathaniel Boyden had recovered his costs of this Court, $42.10, against the defendant on an appeal. See *Boyden* v. *Bank*, 65 N. C. It was further shown that an execution in favor of the bank had issued, tested of June Term, 1871, of this Court against one Caldwell for $324, and that the amount thereof had been paid into the office of the Clerk of this Court, in satisfaction of an execution which had been issued upon the same, and that it was now in the hands of the Clerk of this Court.

W. H. Bailey, in support of the motion:

I. On the general question. *Clerk's Office* v. *Allen*, 7 Jones, 156. *Turner* v. *Fendall*, 1 Cr., (U. S) 116.

II. Assignee takes, subject to all equities. 2 Story, Eq., Juris., secs. 1038, 1228, 1229 and 1411.

J. M. McCorkle, contra.

"No lien can be acquired, *or enforced*, by any proceeding in a State Court, commenced after the petition is filed. Bump's Law on Bankruptcy, (4th edition,) 360. See case *in re Wynne*, 4 B. Register, 5.

How can any lien be created upon the money in the office, which did not reach the office till *after* an adjudication in bankruptcy? See Bankrupt Act, sec. 20. The C. C. P. creates no lien on personalty till after levy. In our case, defendant is a bankrupt.

No other, but the Court of Bankruptcy, can interfere with the estate of an adjudicated bankrupt. See Bump on Bankruptcy, 276, (4th edition.)

In re McIntosh, 2 Bankrupt Register, 158, where (216) Judge Brooks holds that no *lien* is created until a levy.

Here, there was none, and cannot be *after the adjudication* See also, IV, A. L. Review, 543, title "Lien;" V, A. L. Review, 523, title "Lien."

RODMAN, J. *Case.*—At June Term, 1871, of the Supreme Court, the Bank of Cape Fear, recovered a judgment against R. A. Caldwell for $324, and costs, 90 cents, upon which a *fieri facias* execution issued, tested the 1st Monday in June,

1871, and returnable to January Term, 1872, under which the money was paid into the Clerk's office, where it now is.

In the same case, it was adjudged that the said Caldwell recover of the Bank costs, taxed at $4.20, for which a like execution issued against the Bank, and is returned unsatisfied.

At the same Term, to-wit, June, 1871, Nathaniel Boyden recovered against the Bank, costs of the Supreme Court, taxed at $42.10 (forty-two 10-100 dollars), upon which a like execution issued, and is returned unsatisfied.

The Bank was adjudicated a bankrupt, on a day not particularly stated, but just before, or just after, the commencement of this term, and an assignee has been appointed. It is moved, on behalf of the Clerk's office, for an order to retain the above costs out of the funds in Court.

If the question was unaffected, by the operation of the Bankrupt Act, there could be no doubt about the power of the Court. The case of *Clerk's Office* v. *Allen*, 7 Jones, 156, shows the practice prior to C. C. P., and the power is not taken away, but rather confirmed, and extended by sections 265, 266, 268 and 269, of the Code.

It is contended, on behalf of the assignee in bankruptcy, that the whole sum recovered against Caldwell, passed to the assignee, under section 14, of the Bankrupt Act, subject only to existing liens, and that here is no lien, and, there-
(217) fore, it is not in the power of this Court to apply any part of the fund in the way proposed.

We do not profess to be familiar with the decisions of the numerous Bankrupt Courts throughout the country, nor have we access to the books, in which they are reported. None of the cases cited to us by counsel, from the Bankrupt Register, so far as we can judge from the brief extracts furnished to us, appear to decide the present question, and we must, therefore, be governed in our opinion by general principles.

It is conceded, that this is not a case of lien. But we conceive, as was said in *Carr* v. *Fearington*, 63 N. C., that an assignee in bankruptcy, more nearly resembles a purchaser of the bankrupt's property, at an execution sale, than any other familiar character to which we may liken him. He takes the bankrupts's rights, but he takes something more; he is not bound by the fraudulent conveyances of the bankrupt, as he himself would. He cannot take paramount to all equities, against the bankrupt, as in many cases that would be manifestly unjust. The only intermediate position possible,

is that of a purchaser at execution sale, who acquires the rights of the debtor in the property, and, also, the rights of the creditor to impeach any prior fraudulent conveyances, but who takes, subject to all equities against the debtor, in the property purchased. This view of the character of the assignee is sustained by sections 1038, 1228, 1229 and 1411, of 2 Story's Eq. Jur., to which we were referred by counsel. In this case, we think, there was what may be called an equity, existing in the Clerk's office to have its costs paid out of the fund of the bankrupt in Court, and affecting the particular property, of which the assignee may be called the purchaser, and subject to which, therefore, he took We do not see, that it can make any difference, whether the adjudication of bankruptcy was before or after the commencement of the present term of this Court. So long as the fund came lawfully into this Court, it remains there under its control, and subject to be applied according to its usual practice. We do not (218) think that it was the intention of the Bankrupt Act to deprive the ordinary Courts of that power. It is not the giving of a preference to one creditor of the bankrupt over another; but merely the giving effect to an equity, existing, by virtue of the long-settled regular practice of the Courts.

The Clerk will retain the costs due his office out of the fund, and pay the residue to the assignee of the bankrupt.

AMOS HOWES *v.* EPHRAIM MAUNEY *et al.*

1. When Judges exchange circuits, the instant one of them enters the district, the Courts of which first commence—at the same instant the resident Judge of such district becomes Judge of the other, and, in such case, it is the duty of the Judge of the district first entered to repair to the other district, so as to reach it at the time his own is reached by the other Judge.
2. It is erroneous, in an action brought to prevent irreparable injury by a sale of land, to try the question of title on affidavits, and, therefore, where, from the affidavits on both sides, there is reasonable ground to support the averment of the plaintiff, that the vendors (the defendants) are not able to make good title, an order enjoining a mortgagee, under a mortgage to secure the purchase money, will not be vacated until the question of title has been tried in the usual way.
3. Where land is sold by deed, and the vendee immediately reconveys by mortgage, to secure the payment of the purchase money, enters into possession and makes valuable improvements, and obtains an injuction to restrain a threatened sale under the terms of the mortgage, and the order is continued to the hearing, *held*, that the defendants might move for a receiver.

This was a motion to vacate an order of injunction, heretofore obtained by the plaintiff, and heard by His Honor, Judge Cannon, at Salisbury, on the 2d day of September, 1871.

The action, in which the order was made, was pending in the Superior Court of Rowan. By leave of the Gov-
(219) ernor, Judges Cloud and Cannon had exchanged Circuits, and Judge Cloud was holding Courts in the 12th, on the 2d September, 1871. The 8th District Courts commenced on Monday, the 5th day of September, and the plaintiff objected here, that Judge Cannon had no jurisdiction over business in the 8th, until the 5th day of September, 1871.

This matter was argued and determined as preliminary to the main point, and a separate opinion was delivered, but, for convience, the two opinions are conjoined.

The case below was heard upon affidavits on both sides. It appeared from the affidavits on both sides, that prior to the 9th of July, 1855, the defendants, the two Holmes and two Mauneys, were seized in fee of the premises, (a mining property); that, having before that time, sold the same to one Isaac H. Smith, acting for and on behalf of, the Gold Hill Mining Company, a corporation created under the laws of New York, and of which said Smith was President, and having received a full fee simple price therefor, on that day, they executed a deed, whereby they conveyed the same to said Smith, his successors and assigns, in trust for the said Company, whereby but a life estate in the legal title passed to said Smith, and a legal reversion remained in the bargainors. Smith died in 1858, whereby, the whole legal title became vested in the bargainors.

In 1860 and 1861, attachments were sued out against said Company, and were levied on the premises as its property. At August Term 1861, judgments were obtained on these attachments, and the premises were sold by the Sheriff on the 6th day of January, 1862, by virtue of writs of *ven. ex*, issued to enforce the same. At this sale, the defendant Roberts became the purchaser, and having taken a Sheriff's deed therefor on the next day, 7th of January. 1862, conveyed shares therein to the other defendants. In April 1866, the plaintiff as agent for a corporation, created in New York, in 1865, called the N. C. Ore Dressing Company, made an executory contract with defendants to purchase the premises at
(220) the price of $25,000, and took a bond for title; on this purchase, some $15,000 having been paid, and the

balance being in arrear, the defendants brought a civil action, in the nature of a bill for foreclosure, in the Superior Court of Rowan, and it seems that that suit was compromised. At any rate Howes, on the 4th day of May, 1870, purchased from the defendants, surrendering the bond for title, (taking up the remaining notes given on that purchase,) for the price of $------, took a deed with covenants of seizing, against incumbrances, of good right to convey, and in one of them a restricted covenant of quiet enjoyment, and at the same time executed a mortgage with a power of sale to secure the purchase-money, and having as he alleged, discovered that the title was defective, failed to pay instalments as they fell due, and the mortgagees, (the defendants) advertised a sale of the premises under the mortgage.

In 1866, a bill was filed, by one Brockleman against the defendants and the Gold Hill Mining Company, alleging indebtedness of the Company to him, by a judgment, which after execution returned *nulla bona*, remained unsatisfied, and setting forth the equitable title of the Company to the premises, as above stated, and praying a sale thereof to satisfy his judgment. That a sale was ordered to be made by a commissioner named, but in the order of sale it was expressed, that the title was to be reserved, until twenty-five thousand dollars was paid to the defendants, (other than the Company,) under the executory contract with Howes as agent for the N. C. O. D. Co.; a sale was made and confirmed, and an unconditional order was made, directing title to be made to the purchaser, on payment of his bid, and that said bid had been paid, but the commissioner had refused to make title.

The plaintiff averred a general knowledge of the attachment suit and of the bill in equity, but, that he was ignorant of the effect of the war on the rights of the Gold Hill Mining Company, and had only, recently, before the exhibition of his affidavit, come to the knowledge of the utter worth-
(221) lessness of the defendants' title, viewed in the light of a late decision of the Supreme Court of the United States. The defendants swore, that plaintiff bought with full knowledge, of the defects in their title. M. L. Holmes and E. Mauney, filed separate affidavits—Holmes swearing that the purchaser was the agent of the plaintiff, and Mauney, that he was agent of N. C. O. D. Co., and the plaintiff, and that the amount of the bid was furnished him by the President of the last named Company, and a great deal more

touching the knowledge of the plaintiff, which it is considered needless to state, in view of the point decided by the Court.

His Honor, Judge Cannon, vacated the order of injunction heretofore granted, and the plaintiff appealed.

Fowle and *W. H. Bailey*, for the appellant.
Blackmer & McCorkle and *Phillips & Merrimon contra.*

PEARSON, C. J. The instant Judge Cloud entered the 12th District, he was the Judge of that District. At the same instant Judge Cannon was Judge of the 8th District; and it was his duty to have left home, in reasonable time, (by communication with Judge Cloud) to reach the 8th, at the time Judge Cloud reached the 12th District. The circuit of the 12th District begins a month sooner than the circuit of District 8th, and the circuit of District 8 does not end, until a month after the end of District 12. So, it was the duty of Judge Cloud to remain in District 12, until within a reasonable time, he could reach District 8, about the time that Judge Cannon re-entered District 12.

This construction is necessary to avoid the absurdity of having two Judges in one District, at the same time, and no Judge in the other. When Judges choose to exchange Districts, they submit to the maxim "*privatum incommodum, bono publico pensatur.*" Broom's Legal Maxims, 6.

Every Judge shall reside in his District. The Judges
(222) may exchange Districts, (not circuits) with consent of
the Governor Constitution, Art. 4, sec. 14.

A literal construction, would require an absolute exchange of Districts, and here the Governor is required to sanction the exchange. A liberal construction will allow an exchange of circuits, that is, an exchange of Districts, for one circuit; but to justify this construction, "the ends must be made to meet," and the absurdity of having two Judges in District 12, at the beginning, and no Judge in District 8, for one month, and of having two Judges in District 8, at the end, and no Judge in District 12, for one month, must be avoided. Qualified in this manner, an exchange of circuits may be made, and the legal consequences will be, as above stated. So, Judge Cannon, in our case, was Judge of the 8th District, when he made the order.

* * * * * * * * * *

How this case will present itself at the hearing, for final

action, we cannot anticipate; it is enough now to see, there is reasonable ground, to support the averment, that the vendors, (the defendants,) are not able to make a good title, under the title derived from Roberts. This puts the defendants upon the original title, before the deed to Smith—at whose death, the Gold Hill Mining Company, had not an equitable estate, or trust estate, subject to execution; but a right of action in equity, to have the deed reformed; or to treat it as evidence in writing, within the statute of frauds, of a contract to convey land, upon the payment of the purchase-money. This equity belongs to the Gold Hill Mining Company. We are not able to see, on affidavits, where the title is; we are satisfied, that the improvements put on the land, make it ample security, for the debt claimed.

Judgment below reversed.

The defendants will be enjoined from exercising this power of sale, but the plaintiff must pay into the office of the clerk, the net monthly proceeds, of the operations of the "Ore (223) Dressing Co.," to keep down the interest, or as it may be, to extinguish a part of the principal of the debt, which constitutes the original purchase-money. This matter is confused by the pleadings—how did the Gold Mining Co. pass off, and the Ore Dressing Co. takes its place?

The injunction will be continued, with leave for the defendants to apply for a receiver, in order to have the net monthly proceeds of the mine applied to keep down interest, &c.

As the matter is heard on affidavits, we, of course, do not touch upon the merits. We only say, the matter as it now appears, is not "mere sham," but is something fit to be considered of. Should the defendants be allowed to sell the premises, that would put an end to the matter, this we are unwilling to do, upon affidavits.

ELIZABETH IVEY *v.* SARAH A. GRANBERRY.

1. A deed for land, when registered, has all the force and effect, of a feoffment at common law with livery of seizin and a declaration of uses thereon.
2. By the policy of our statutory law, a bastard stands in such relation to his *mother*, that the relationship between them is a sufficient consideration to raise a use, *aliter* as to the *father*.
3. A registered deed, from a mother to a bastard child, is valid and conveys the title, either, as having the same operation as a feoffment with

livery accompanied with a declaration of the use, or, as a covenant to stand seized to uses.

4. Since, as well as before, the statute of uses, 27 Hen., 8, no actual consideration is necessary to raise a use in conveyances operating by transmutation of possession as fine, feoffment, &c., and a deed to lead or declare the uses, was only necessary to prevent a resulting use, arising to the conusor, feoffor, &c.

5. Here, as registration supplies the place of a feoffment with livery, the deed has the effect to lead the uses and thus rebuts the resulting trust.

(224) 6. Whether the question of a lack of consideration is open to any but creditors and purchasers for value, *quere*—per READE, J., it is not.

The cases of *Harrell* v. *Watson*, 63 N. C., 454; *Hogan* v. *Strayhorn*. 65 N. C., 279, and *Blount* v. *Blount*, 2 C. L. Rep., 587, cited and approved and the last distinguished from the principal case.

This was a civil action submitted to His Honor, Judge Pool, on a case agreed at Fall Term, 1871, of Perquimans Superior Court.

From the case agreed it appears that the land sued for formerly belonged to one Sarah Coulson; that the plaintiff is the illegitimate daughter of said Sarah; that said Sarah, by deed, executed in 1833, and registered in 1834, conveyed the premises to the plaintiff, who was then, and continuously remained to 1869, covert; that the deed is expressed to be made in consideration of love and affection, and does not use any of the operative words usually found in deeds, such as grant, bargain, &c., but only these words, "I do lend," &c.; the premises consists of wood-land, and neither plaintiff nor her husband, ever took possession; said Sarah had legitimate children and the defendant claims, mediately, title under them was in possession.

His Honor, being of opinion with the defendant gave judgment accordingly, and, the plaintiff appealed.

Gilliam, for the appellant.
Bragg & Strong, and *W. F. Martin*, for the appellee.

Sarah Coulson, by deed, dated in 1833, "for love and affection loans," the land in question, to the plaintiff and her husband, at their death, to the children of the plaintiff, if she leaves any, if not, Sarah Coulson wishes the land to go to her legal heirs. This deed was registered in 1834.

The plaintiff was the illegitimate daughter of Sarah Coulson, who died leaving legitimate children.

(225) The plaintiff never had actual possession of the land, nor had her husband, who died in 1869.

The defendant had actual possession at the time of demand, (before suit brought) has continued in possession since, and claims under regular chain of title from the heirs of Sarah Coulson.

Uses can only be raised in three ways generally: 1. Feoffment. 2. Covenant to stand seized. 3. Bargain and sale. 7. Bacon Ab (E) 87 (uses and trusts); 65 N. C. R. 279; R. C., ch 37, sec. 1.

Here, there being no valuable consideration, the title must have passed by covenant to stand seized, or by way of transmutation of possession.

1. Covenant to stand seized requires a good consideration (blood or marriage).

Love and affection to illegitimate child is not a good consideration. *Blount* v. *Blount*, 2 C. L. R., 391, (587) 7 Bac. Ab.; title, Uses, (E) *98.

Though a bastard be a reputed son, he is not such a son as can raise an use. Bastard not within 32 H. 8, as no child of mother. Cannot take, under power of appointment, in the mother, as not her child. 4 Vesey, Jr., 771. Also, no child of mother. 5 *Ibid*, 530.

It is against the policy of the law, especially where there are legitimate children. The only two cases in the statute law of the State are limited. R. C., ch. 12, sec, 9. R. C., ch. 38, sec. 1, rule 10.

2. If the Court should be of opinion, that notwithstanding there has been no actual possession in the plaintiff, by foeffment and registration in lieu of livery of seizin; by way of transmutation of possession under Act of 1711. (See Co. Litt 123, sec. 188, note 8). Still a loan cannot operate as a foeffment, of which the apt words are enfoeff, grant, *do or dedi.* 2 Shar. Bl. Com., 309, 310, 317. "Loan" would be operative in will, because the maker was *inops concilii*, and not
(226) required to be so exact in the choice of apt words. The intent is more liberally construed.

If title passed, it was immediately drawn back to the grantor, as the deed was witout consideration. 65 N. C. R., 279.

READE, J. The most ancient and the best kind of conveyance of land at common law was by foeffment, and this might be without writing, and without consideration. It was a gift. It was perfected by livery of seizin. The feoffor and feoffee

with witnesses went upon the land, or near it, and the feoffer delivered the land itself or some symbol of it to the feoffee. By this ceremony of the actual delivery of the possession, the title of the land passed to the feoffee. Subsequently it became common to accompany the feoffment by a deed of writing, not because it was necessary, but because it was convenient for the purpose of declaring the uses, &c., and describing the premises, and because the writing was more reliable than the memory of witnesses; but still it was the livery of seizin that passed the title, and not the writing. Subsequently the Statute of frauds and perjury made a writing necessary.

If the mother of the plaintiff had actually gone upon the land, with the plaintiff and with witnesses, and made livery of seizin, it cannot be doubted, that at common law, the title would have passed. And so, after the statute of frauds and perjuries, if the deed had accompanied the livery of seizin, the title would have passed. Why then does not the deed of the mother pass the title to the plaintiff as at common law? Evidently because there was no livery of seizin. But then comes our statute, which provides that a deed registered shall have the same effect to pass title to land as if there had been livery of seizin. *Rev. Code, title Deed.* So that the plaintiff's deed registered, is just as effectual to pass title to her under our Statute, as a gift with livery of seizin would have been at common law.

What is there, then, in the way of the plaintiff's recovery?

(227) 1st It is objected that the conveyance to her is without consideration; and that a consideration is necessary. It is well settled that before the statute of uses a consideration was not necessary to support a feoffment. But the construction of that statute was to transfer the legal estate to the use; and inasmuch as in a feoffment there was a resulting use to the feoffer, the statute immediately revested the legal estate in the feoffer, unless the use was declared in the deed of feoffment. And the use might be declared to be to the feoffee or to a third person and this might be "without consideration of marriage, money, kindred or the like; for in this case the will of the feoffer guides the equity of the estate, or rather, the feoffee cannot controvert the use." 2 Shep. Touch., 507. But, under that statute, if there was a deed of bargain and sale, which must be upon a consideration, then the consideration raised an use for the bargainee,

and then the statute transferred the legal estate to the use, i. e., to the bargainee. It will seen, therefore, that a consideration was necessary under that statute in cases of bargain and sale, and in feoffments where no use was declared in the feoffment, and in this last case only to prevent the implied or resulting use to the feoffor.

In the case before us the plaintiff's deed, which, being registered, has all the force of a feoffment, conveys the land to her; and although it is without consideration there is no resulting use to to the feoffor, for the reason that the deed declares the use to the plaintiff and to others.

All this is said upon the supposition that the deed is without a consideration.

But is it without a consideration?

2. It is objected that natural love and affection, for a bastard child, is not a sufficient consideration.

A covenant to stand seized to the use of a bastard son in consideration of natural affection, is not good. If a man parts with land in advancement of his issue, and to provide for the contingencies and necessary settlements of his family, it will be supported; for their establishment is a part (228) of the nature and end of government. But a bastard is not supposed to be of the blood of the father, or to have his natural affection. Bacon, Uses and Trusts, E. But if a man covenants in consideration of natural affection, to levy a fine and that the cognisee shall stand seized to the use of his bastard baughter, though this be not sufficient to raise a use upon a covenant, yet is expressive of the intent of the party and therefore shall serve as a sufficient declaration of a use upon the fine which needs no consideration to support it. 2 Roll, Abr., 785; Gilbert Law of Uses, 207, quoted by Bacon, Title Uses and Trusts.

And I suppose the same would be of a feoffment, which requires no consideration.

But, however this may have been heretofore, a conveyance of land, under our statute, by a mother to her bastard daughter, will be supported as upon sufficient consideration, either as a feoffment, or as a covenant to stand seized; for our statute provides, that, "When there shall be no legitimate issue, every illegitimate child of the mother, shall be considered an heir, and as such, shall inherit her estate." Rev. C., ch. 38, sec 10. It is evident from this, that the policy of our law, is to regard bastards, as of the inheritable blood of the

mother. And they who are next in blood, are next in love by intendment of law. And, therefore, the same reasons, which make conveyances to other blood relations good, operate in favor of conveyances to bastards. Nor does it make any difference, that there are legimate children at the time of the conveyance, because, there may be none at the death of the mother. So that, the bastard is capable of inheriting, although, it may turn out, that she might never inherit in fact. She has inheritable blood, and it is that which constitutes the consideration. It is to be noted, that our statute, has not extended the same policy to reputed *fathers* of bastards, as to *mothers* of bastards, on account of the uncertainty, probably, as bastards are still considered as having no *father*.

And that distinguishes from this case, the case of (229) *Blount* v. *Blount*, 2 Car. L Rep., 587.

There is also another ground, upon which the title of the plaintiff may be supported. It is settled, that a deed, as *between* the parties, is good without a consideration.

Surely, one may give by deed while he lives, as well as he may by devise, after his death. In either case, no one can be heard to complain, except creditors, or purchasers for value. *Harrell* v. *Watson*, 63 N. C., 454; *Hogan* v. *Strayhorn*, 65 N. C., 279.

There is error. Judgment reversed, and judgment for plaintiff.

Per Curiam. Judgment reversed.

F. A. McNINCH *v.* JOHN A. RAMSAY.

1. An action on a note payable "six months after a ratification of a treaty of peace between the United States and the Confederate States," is premature and cannot be sustained.

2. The event constitutes a condition precedent, which has not and will not be performed.

The case of *Chapman* v. *Wacaser*, 64 N. C. R., 53, cited, approved and distinguished from the principal case.

This was a civil action, founded on a note for money, payable on the condition recited in the *syllabus*, and was tried on demurrer to the complaint before His Honor, Judge Moore, at July Special Term, 1871, of Mecklenburg Superior Court. His Honor sustained the demurrer, and the plaintiff appealed.

Vance & Dowd, for the appellant.
Fowle and *W. H. Bailey*, for the appellee.

READE, J. In *Chapman* v. *Wacaser*, 64 N. C. R., 532, (230) the words in the bond were, "Ten days after peace is made between the United States and the Confederate States," &c. And it was held that the bond was payable ten days after the war ended and peace *existed*, without regard to the manner in which peace was brought about. The Court were not unanimous in that opinion, but we adhere to it. In that case it is said, that if the bond had been as this is, in the words of the Confederate Treasury notes, the decision would have been different.

In the case before us the words of the bond are, "six months after the ratification of a treaty of peace between the United States and the Confederate States," &c. And the question is, whether the event, upon which the bond is payable, has happened?

It is to be observed that the language of this bond is the language of the Confederate Treasury notes, which were circulating as money. And the plain and universally understood meaning of the Treasury notes was, that if the Confederate States obtained independence, then their notes would be paid, otherwise not. These notes were in the hands of everybody, and their language was as familiar as the meaning was plain. It cannot be doubted, therefore, that when the parties to this note adopted the language of the Confederate Treasury notes, they adopted their well understood meaning. The language is plain, that the bond is payable after the ratification of a treaty of peace, &c.

There has been no treaty and no ratification. Peace exists, to be sure, but not by a ratification of a treaty, nor yet by the independence of the Confederate States, which was the thing contemplated; and so the condition precedent has not been performed, and can never be.

THERE IS NO ERROR. Judgment affirmed.

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(231) STATE, upon the relation of William H. Howerton *et al.* *v.* S. McD. TATE *et al.*

1. Whether a mandamus can be used to try the title to an office, under any circumstances, *quere.**

*In the later case of J. J. Mott *et al v.* S. McD. Tate *et al.*, involving the same points, and, therefore, not reported, this Court held that "mandamus is not the appropriate remedy for the case made by the petition and complaint," [which are confined alone to the assertion of a claim of title to an office.—*Atty. Gen.*] The remedy is by an action in the nature of a writ of *quo warranto* provided for C. C. P., secs. 366, 368 and 369.

2. But, not being provided for by the C. C. P., it must by virtue of sec. 392, C. C. P., be governed by the former practice, and hence must be moved for, and be made returnable in *term time*.

This was an application made to His Honor, Judge Cloud, *in vacation*, for a mandamus to try the alleged right of the relators to the office of Directors, in the Eastern Division of the Western North Carolina Railroad Company. But it is deemed unnecessary to set forth the facts bearing upon the claim made, as the case went off upon a question of practice. His Honor granted an order for an alternative mandamus, on the 2d of December, 1871, returnable before himself, on the 8th day of January, 1872, at Salisbury. When and where the defendants appeared, and through their counsel moved to quash the proceedings on four grounds, viz:

1. That it should have been commenced by summons.
2. That they should have been begun in, or have been made returnable to, term time.
3. That no facts sufficient, &c., were set forth in the petition.
4. That mandamus was not the appropriate remedy.

His Honor sustained the motion, and ordered the proceedings to be quashed, from which order the relators appealed.

(232) *Fowle, Blackmer & McCorkle* and *W. H. Bailey*, for appellants.

Phillips & Merrimon and *David Coleman*, for the appellees.

PEARSON, J. Supposing the writ of mandamus to be the proper remedy, which we do not concede, C. C. P., secs. 366 and 367, (see *Clark* v. *Stanly*, at this Term,) the proceeding was not properly instituted. The order for the writ must be made in term time, and be returnable in term time. It was conceded such was the practice under the old system; but it was insisted that the C. C. P. had made a change. We do not think so. It is not an ordinary civil action, or a special proceeding, if so, it should have been commenced by summons, but it is neither an ordinary civil action, nor a special proceeding, to be returned before the Clerk.

It is a high prerogative writ, embraced under sec. 392. "If a case shall arise, in which an action for the enforcement, or protection of a right, or the redress or prevention of a wrong, cannot be had under this Act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice.

THERE IS NO ERROR. Judgment affirmed.

(233) PHILLIPS WALSH *vs.* RUFUS D. HALL.

1. Where a horse is exchanged for land, and having afterwards returned to the possession of the original owner, the latter is sued for it, the allegation in the answer that the defendant had agreed to exchange the horse for a tract of land on a certain creek, adjoining his own, and that the plaintiff had falsely and fraudulently asserted title to said tract, and had exhibited a deed to himself for a tract on the same creek, and that the plaintiff well knew that the defendant was only desirous of obtaining title to the particular tract indicated by him, and such was a material inducement to the exchange, would not have been *available*, as a defence under the former system, and but for the wise and beneficent provisions of the C. C. P., the defendant would have been driven to a separate action; but such a statement under the C. C. P., does constitute a good counter-claim, within the meaning of the Code.
2. Ordinarily the maxim of *caveat emptor*, applies equally to sales of real and personal property, and is adhered to in all courts, where there is no fraud.
3. But if representations made by one party to a contract, which may be reasonably relied on by the other, constitute a material inducement to the contract; are knowingly false; cause loss to the other party relying on them, and such other party has acted with ordinary prudence, he is entitled to relief in any Court of Justice.
4. If the parties have equal means of information, the rule of *caveat emptor* applies and an injured party cannot have redress, if he fail to avail himself of those sources of information which he may readily reach, unless prevented by the artifice or contrivance of the other party.
5. So, if the false representation is a mere expression of commendation, or simply a matter of opinion, the parties are considered as standing on an equal footing, and the Courts will not interfere.
6. In contracts of this character, fraud without damage, or damage without fraud, are usually not the subject of an action for deceit.
7. In a case like that set forth in the answer, the purchaser of land is not required, in order to guard against the fraudulent representations of a vendor, to cause a survey to be made, unless some third person is in possession claiming title; or there is some dispute about boundary or as to the true location; or he has received some information which would reasonably induce him to suspect fraud.
8. The general custom of conveying land, according to the calls of old deeds, and without a survey, is sufficiently established to be rea-
(234) sonably relied on by a purchaser, as to description of location and boundary.

The cases of *Fagan* v. *Newsom*, 1 Dev. 20; *Saunders* v. *Hatterman*, 2 Ired. 32; *Lytle* v. *Bird*, 3 Jones, 222, and *Credle* v. *Swindell*, 63 N. C. R., 305, cited, approved and distinguished from the principal case.

This was a civil action, heard on complaint, counter-claim and demurrer, before his Honor, Judge Mitchell, at Fall Term 1871, of Caldwell Superior Court. The plaintiff, in his complaint, alleged title to a horse in himself, and that the same had been taken out of his possession by the defendant, and was detained after demand, and demanding appropriate relief.

The defendant by his answer and counter-claim, denied that the plaintiff was the owner of the horse, in equity; that the horse had been in possession of the plaintiff, but had escaped, and having strayed back to his old home, had been ever since retained in his custody. That he was the owner of a tract of land in Wilkes county, lying on Elk Creek; and that the plaintiff pretended to be seized of a tract lying on the same creek, and adjacent to the land owned by the defendant, which he knew the defendant was desirous to purchase; that the plaintiff approached the defendant, and proposed to him to exchange the land for the said horse, which proposition the defendant at first rejected, on the ground that he heard that one Hendricks claimed the land; the plaintiff, thereupon, positively asserted that the true title was in himself; that said land once belonged to one Witherspoon, who had conveyed to him, and that Hendricks had no title; that the deed from Witherspoon was produced, and purported to convey a tract of land, lying on Elk Creek; that, thereupon, the defendant accepted the proposition of the plaintiff, took a deed from him, following the boundaries contained in the Witherspoon deed, and delivered to plaintiff the horse; that the plaintiff, during the negotiation, frequently asserted that the deed from Witherspoon, covered the land which
(235) he proposed to exchange for the horse; that he had been in possession for more than seven years, under the said deed, and that by virtue of said deed and possession, he had acquired a good title thereto; that the defendant, confiding in these representations, made the trade.

The counter-claim further set forth that the defendant sometime after the trade, ascertained that the deed from plaintiff did not cover the land he was seeking to purchase, or any part of it, but another tract adjoining the tract which defendant was desirous to obtain, and thought he had obtained, and the title to the tract which he wished to purchase, and which the plaintiff professed to sell, and which he said the boundaries of his deed covered, was, in one Ferguson, and that this was well known to the plaintiff, and that the defendant was ignorant thereof, and concludes by alleging the entire insolvency of the plaintiff, and by an appropriate demand for relief on his counter-claim.

To this counter-claim a demurrer was interposed, which was sustained by His Honor, who gave judgment for plaintiff, and thereupon the defendant appealed.

Armfield, for the plaintiff.
Folk, for the defendant.

The answer of the defendant may contain a statement of any new matter constituting a defence or counter-claim. C. C. P., sec. 100.

The defendant may set forth by answer as many defences and counter-claims as he may have, whether they be such as have heretofore been denominated legal or equitable, or both. Sec. 102.

As a special plea had to confess and avoid the cause of action alleged in the declaration, so new matter is that which admits and avoids the cause of action set forth in the complaint. Under the head of equitable defences are included all matters which would have authorized an applica-
(236) tion to a Court of Equity for relief against a legal liability, but which, at law, could not be pleaded in bar. *Harshaw* v. *Woodfin*, 65 N. C., p. 688; *Clark* v. *Clark*, *ibid*, p. 660. If this be so, the defendant is entitled to judgment, for the demurer admits the facts set forth in the answer, and they are sufficient to induce a Court of Equity to rescind the contract. *Blackwood* v. *Jones*, 4 Jones' Eq., 54; *Woods* v. *Hall*, 1 Dev. Eq., 411. Courts of Equity rescind executed contracts on the ground of fraud. *Sparks* v *Messick*, 65 N. C., p. 440; C. C. P., sec. 248.

The action is for the delivery of specific personal property, i. e., an action of detinue. This action is distinguishable from an action of trespass.

In detinue, the plaintiff must prove property, either general or special. In trespass, possession is sufficient against one who cannot show a better right than plaintiff. *Armory* v. *Delamirie*, Smith's Leading Cases, Vol. 1. Had the defendant committed a trespass, by taking the horse, and been sued for the taking, it may be that he could not have interposed the equitable defence. But in this action, the plaintiff relies on property, which he acquired by contract tainted with fraud, and when the contract is rescinded, the plaintiff has no property.

It must be admitted, that defendant can file a bill to rescind the contract, but to require him to do so, would be to put us back to the place from which we started, and defeat the object of the Code, which was to settle all matters in one suit.

DICK, J. This is a civil action, in the nature of an action of detinue, to recover a horse from the defendant.

The defendant filed an answer, controverting some of the allegations of the complaint, and made a statement of new matter, which he insisted, constituted a counter-claim to the plaintiff's cause of action. The plaintiff demurred, and thereby admitted the truth of the defendant's statement of new matter, and we must consider whether the admitted facts constitute a good counter-claim in this action.

The defendant alleges that he was the owner of the
(237) horse in controversy, and exchanged it with the plaintiff for a certain tract of land, which the plaintiff wilfully and falsely represented as being contiguous to the land of the defendant—that he was very desirous of obtaining a certain adjoining tract of land, and this desire of the defendant was known to the plaintiff, and was a material inducement to an exchange of property; that the land is not adjoining, and this fact was well known to the plaintiff; and thus the horse was obtained by actual fraud from the defendant, and he asks that the contract may be rescinded. This new matter set up by the defendant, is connected with, and forms a material part of the contract, out of which this cause of action arose, and constitutes a proper counter-claim; and we must consider whether he is entitled to the relief which he demands.

The maxim of *caveat emptor*, is a rule of the common law, applicable to contracts of purchase of both real and personal property, and is adhered to, both in courts of Law and courts of Equity, where there is no fraud in the transaction. Where land has been sold, and a deed of conveyance has been duly delivered, the contract becomes executed, and the parties are governed by its terms, and the purchaser's only right of relief, either at law or in equity, for defects or incumbrances, depends, in the absence of fraud, solely upon the covenants in the deed which he has received. Rawle on Covenants for Title, 459.

If the purchaser has received no covenants, and there is no fraud vitiating the transaction, he has no relief for defects or incumbrances against his vendor, for it was his own folly to accept such a deed, when he had it in his power to protect himself by proper covenants.

But in cases of positive fraud a different rule applies. The law presumes that men will act honestly in their business

transactions, and the maxim of *vigilantibus non dormientibus jura subveniunt* only requires persons to use reasonable diligence to guard against fraud; such diligence as pru-
(238) dent men usually exercises under similar circumstances. In contracts for the sale of land, purchasers usually guard themselves against defects of title, quantity, incumbrances and disturbance of possession by proper covenants: and if they do not use these reasonable precautions, the law will not afford them a remedy for damages sustained, which were the consequences of their own negligence and indiscretion.

But the law does not require a prudent man to deal with every one as a rascal, and demand covenants to guard against the falsehood of every representation, which may be made, as to facts which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of men, or the transactions of business, trade and commerce could not be conducted with that facility and confidence which are essential to successful enterprise, and the advancement of individual and national wealth and prosperity. The rules of law are founded on natural reason and justice, and are shaped by the wisdom of human experience, and upon subjects like the one which we are considering, they are well-defined and settled.

If representations are made by one party to a trade which may be reasonably relied upon by the other party—and they constitute a material inducement to the contract—and such representations are false within the knowledge of the party making them,—and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice.

In our Courts the injured party may bring a civil action in the nature of an action on the case for deceit, and recover the damages which he has sustained; and if this remedy will not afford adequate relief he may invoke the equitable jurisdiction of the Court to rescind the contract and place the parties in *statu quo*.

No specific rule can be laid down as to what false
(239) representations will constitute fraud, as this depends upon the particular facts which have occurred in each case, the relative situation of the parties and their means of information. Examples are given in the books which have established some general principles which will apply to most

cases that may arise. If the falsehood of the misrepresentation is *patent*, and a party accepts and acts upon it with "his eyes open," he has no right to complain. If the parties have equal means of information, the rule of *caveat emptor* applies, and an injured party cannot have redress, if he fail to avail himself of the sources of information which he may readily reach, unless he has been prevented from making proper inquiry, by some artifice or contrivance of the other party. Where the false representation is a mere expression of commendation, or is simply a matter of opinion, the parties stand upon equal footing and the Courts will not interfere to correct errors of judgment. Where a matter, which forms a material inducement, is peculiarly within the knowledge of one of the parties and he makes a false representation as to that fact, and the other party, having no reason to suspect fraud, acts upon such statement and suffers damage and loss, he is entitled to relief. Whenever fraud and damage go together, the Courts will give a remedy to the injured party. Broom's Leg. Maxims, 739.

Adam's Equity, 176. Story's Eq. Juris., chap. 6. *Atwood* v. *Small*, 6 Ck. and Fin., 232. Chitty on Con., 681. Broom's Com., 347.

The Courts must determine questions of fraud arising upon ascertained facts, and although the principles of law are well-defined and settled, errors in their application have produced some conflict in adjudicated cases.

We will now proceed to apply the principles of law to the facts admitted in the pleadings in the case before us, and then briefly review the previous cases which have been decided in this State upon a state of facts somewhat similar.

It appears that the defendant resided on Elk creek,
(240) and was very desirous of obtaining a certain tract of adjoining land. The plaintiff knew this fact and pretended to own said land, and offered to exchange it with the defendant for the horse in controversy. The defendant at first refused to make the exchange for the reason that one Hendricks claimed the land.

The plaintiff then positively asserted, that he was the owner, and had purchased the land from Witherspoon, and had a deed, and that Hendricks had no claim whatever; as he (plaintiff) had been in the actual possession and cultivation of the land, under his (Witherspoon's) deed, for more than seven years. This deed was produced, and it purported

to convey a tract of land on Elk Creek; and the plaintiff asserted that he had been in the actual use and occupation of the land which he proposed to sell, for several years.

Upon these representations, which were positively made, and frequently asserted, the defendant exchanged the horse for the land, and received a deed describing the land as lying on the waters of Elk Creek. The deed was written by a nephew of the plaintiff, who kept the deeds of his uncle, and was present during the negotiations for the trade.

The defendant alleges, that he has discovered that the land which he thought he was purchasing, belongs to another person, and that the deed which he received covers an adjoining tract; and that the plaintiff well knew these facts at the time he executed the deed, and that his representations were false and fraudulent.

So it appears that the plaintiff, by false representation about a matter, which was a material inducement to the contract—and which was false within his knowledge—obtained the horse of the defendant. The circumstances attending the trade, were such as to induce a reasonable reliance upon the truth of the statements of the plaintiff, and the defendant neglected no precaution but a survey, in guarding himself against fraud.

(241) The transaction was like hundreds of others in the country, which are entirely fair and honest, and we do not regard the want of a survey as *laches* on the part of the defendant. A large majority of the sales of land, in the State, are completed by the delivery of a deed, copied from some previous deed, and surveys are not generally made, unless there is some dispute about the boundaries. Where the grantor has been in the possession of land for a number of years, exercising acts of ownership, his positive assertion as to location may be reasonably relied upon without a survey.

In the case of *McFerran* v. *Taylor*, 3 Cranch, 270, Chief Justice Marshall says: "He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance. In this case the defendant has sold land on Hingston, and offers land on Slate. He has sold that which he cannot convey, and as he cannot execute his contract he must answer in damages."

If such a contract was made by fraudulent representations, a Court of Equity would not hesitate to rescind the contract.

In our case the plaintiff is insolvent, and prosecutes his unjust claim *in forma pauperis*, and the defendant would be without a speedy and substantial remedy against this gross fraud, but for the wise and beneficent provisions of our Code, which blend in one system, legal and equitable remedies.

From the facts admitted, we think the defendant is entitled to a rescission of his contract with the plaintiff, and to retain possession of the horse sued for.

We also think that the defendant might have sustained a civil action to recover damages occasioned by the fraudulent representations of the plaintiff, although this opinion seems to be in conflict with previous decisions of this Court.

(242) The case of *Fagan* v. *Newsom*, 1 Dev., 20, was the first case upon this subject, and was correctly decided.

The plaintiff had repudiated the executory contract, which was induced by the fraudulent representations of the defendant, and had suffered no damage but the loss of a good bargain, and he could have easily recovered his purchase-money by an action of assumpsit. The principles for which we are contending are distinctly stated in that case, "the plaintiff cannot recover in an action of deceit, unless he proves not only that a fraud has been committed by the defendant, but also that it has occasioned loss and damage to the plaintiff." Chief Justice Taylor, says further, "It is a very reasonable principle that the purchaser should not be entitled to an action of deceit, if he may readily inform himself as to the truth of the facts which are misrepresented. In this case, the plaintiff knew that the defendant had no title to the bottom land, and that it was the property, and in the possession of another." He acted with a full knowledge of the falsity of the representation and sustained no damage, and of course was not entitled to maintain his action. In contracts of this character, fraud without damage, or damage without fraud, are usually not the subject of an action for a deceit.

In *Saunders* v. *Hatterman*, 2 Ired., 32, the fraud complained of consisted in a false affirmation of the value of the land sold. This was a matter of opinion and judgment, and the plaintiff could easily have obtained correct information, and his damage was the result of his own negligence and indiscretion.

The rules of law are correctly laid down as to when an ac-

tion of deceit can be sustained, and they are in accordance with the principles which we have above stated.

Lytle v. *Bird*, 3 Jones, 222, and *Credle* v. *Swindell*, 63 N. C., 305, are founded upon the cases above referred to, but in our opinion the principles of law are not correctly applied to the statement of facts.

(243) For the reasons above given, we think that a purchaser of land is not required, in order to guard against the fraudulent representations of a vendor, to have a survey made, unless some third person is in possession claiming title; or there is some dispute about boundary, or as to the true location, or he has received some information which would reasonably induce him to suspect fraud. The general custom of conveying land, according to old deeds and without a survey, is sufficiently established to be reasonably relied on by a purchaser, as to description of location and boundary.

The location by a survey is a matter of science and skill, and competent surveyors are not easily obtained, and an unskilful surveyor is as apt to mislead as he is to give correct information.

The demurrer to the answer must be overruled, and the defendant is entitled to have the contract rescinded, unless His Honor in the Court below shall, in the exercise of his discretion, allow the plaintiff to reply to the answer, &c. C. C. P., sec. 131. Let this be certified.

PER CURIAM. Judgment reversed.

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(244) J. C. TERRELL, Assignee, *v.* J. D. WALKER *et al.*

1. Where the defendants in an action of debt upon a promissory note, given in 1862, proposed to prove that the consideration of the note was Confederate money, and that fact was admitted by the plaintiff in the action; *held*, that such evidence was immaterial.
2. Under the ordinance of 1865, and the Act of 1866–'67, a party to an action has a right to show that the consideration of the note sued on was property, and the value of the property; and when money was borrowed to rebut the presumption of the law, by proving that it was not to be paid in *Confederate currency*, but in some other money or article.
3. Evidence cannot be introduced to contradict or vary a written contract, except in the cases authorized by the Acts of 1866–'67. The general rule of evidence in reference to such contracts being still in force with the exceptions stated.

4. In an action which was commenced before the C. C. P., a defendant cannot claim, by way of set-off or *recoupement*, unliquidated damages arising out of an executory contract.

Cases of *Teague* v. *James*, 63 N. C. R., 91; *Valentine* v. *Holleman*, *ibid*, 175; *Lindsay* v. *King*, 1 Ire., 401; *Erwin* v. *W. N. C. R. R.*, 65 N. C., 79; *Robeson* v. *Brown*, 63 N. C., 554; *Smitherman* v. *Smith*, 3 D. and B., 89; *Terrell, assignee*, v. *Walker*, 65 N. C., 91, cited and commented on.

The following is the statement made out by the presiding Judge. Case tried at Person Court, Fall Term, 1871.

This was an action of debt, tried before Tourgee, Judge, upon a promissory note, made by the defendant Walker, to the defendant Wade, July 24th, 1862, and assigned to the plaintiff by the defendant Wade in 1867.

The defendant pleaded, "general issue," "payment and set-off," "tender and refusal," and "statutes scaling debts, solvable in Confederate currency." The plaintiff proved the execution and assignment of the note sued on, and admitted that the same was solvable in Confederate currency, and asked judgment only according to the scale.

(245) The defendants offered evidence tending to show that the note was given for money, previously borrowed by the defendant Wade of the plaintiff, for which they had given him a note, which was surrendered to them upon the assignment to him of the note now sued on. The defendants also proposed to prove the contract or understanding between the defendant Wade and the plaintiff at the time of their borrowing the money; that the same might be repaid in Confederate money, and at the option of the borrower; that the plaintiff had knowledge of the transaction between Wade and Walker, in pursuance of which this note was given, and that the same was, in effect, a transaction between the Walkers and the plaintiff, and upon the terms, as the loan made to the defendant Wade by plaintiff.

The plaintiff objected, that in this form of action, this testimony could only be received to show that the note was solvable in Confederate currency, which being already admitted, it was irrelevant and inadmissible. The defendants claimed that the evidence, if true, would defeat the plaintiff's right to recover.

The Court held with the plaintiff, and the defendants excepted.

The defendants proposed to prove a tender. Plaintiff objected, unless the money was produced in Court. Objection overruled, and plaintiff excepted.

Under the instructions of the Court, the jury found for the plaintiff according to the scale of Confederate currency, with interest to the time of tender established, March 15th, 1863, and judgment was entered accordingly.

Fowle, for plaintiff.
Graham, for defendants.

RODMAN, J. This action was brought on a note in the following form:

(246) $3000.50.

Borrowed of R. A. & W. H. Wade, thirty hundred dollars and fifty cents, which we promise to pay, with interest from the 10th inst.

This, the 23d July, 1862.

(Signed,) J. D. & A. WALKER & CO.

It was endorsed to the plaintiff in 1867.

The defendants offered evidence tending to show, that the note was given for money previously borrowed by the Wades of the plaintiff, for which they had given him a note, which was surrendered to them upon the assignment to him of the note now sued on.

The defendants also proposed to prove that the contract, or understanding, between the defendants Wade and the plaintiff, at the time of their borrowing the money, was, that the same might be paid in Confederate money *at the borrower's option;* that the plaintiff had knowledge of the transaction between the Wades and Walkers, in pursuance of which this note was given, and that the same was, in effect, a transaction between the Walkers and the plaintiff, and upon the same terms as the loan made to the defendant Wade by the plaintiff.

The plaintiff objected, that in this form of action this testimony could only be received to show that the note was solvable in Confederate money, which being already admitted, it was irrelevant and inadmissable. The evidence was excluded by the Judge, to which the defendant excepted.

There was a verdict for the plaintiff, and judgment according to the scale for Confederate money applied at the date of the note, (as we suppose, it not being distinctly stated,) with interest up to a tender made 15th March, 1863.

The case as now presented differs materially in several respects from the case made in the same action, when it was before this Court in January, 1871. (65 N. C., 91.) In the case as it then was, there did not appear any allegation by the defendants that *at the time they borrowed* the money
(247) there was an agreement between the parties, that defendants might pay the note in Confederate money at any time thereafter, at their option. Now, the defendants offer to prove that. In the case then before us, facts were stated which the Court held amounted to a waiver of the tender in March. Now, the jury find there was a valid tender in March.

The evidence that affected the present plaintiff, with all the equities that existed against Wade, and evidence that the consideration of the note was Confederate money, was received on the former trial; now, these are excluded, and we are called on to say, whether the evidence tendered by the defendant, was wholly immaterial and irrelevant, or otherwise inadmissible. The excluded evidence may be divided into three sorts, each requiring a different line of consideration.

1. The evidence to put the plaintiff in the place of Wade, and to show that the defendants were entitled, as against the plaintiff, to all the defences which were available to them as against Wade.

As to this we concur with the Judge below, that no evidence to that effect was necessary or material, considering what appeared in the plaintiff's declaration, that the note was endorsed to him long after it was due, and considering also that the identity of Wade and the plaintiff, for the purposes of the action was not disputed, and that the defendants were not attempted to be restricted in their defence by any difference between them. What is expressly admitted, as fully as it is alleged, it is surely unnecessary and immaterial to prove.

2. Evidence that the consideration of the note, was a loan in Confederate money. This also was expressly admitted. We propose to make some remarks on the effect of the various Acts concerning Confederate money contracts, but they will come in better hereafter.

3. We regret that the learned counsel for the defendants did not state with his usual clearness, or at least, we failed clearly to comprehend in what way, and upon what
(248) principle of law he contended, that proof of the alleged agreement co-temporary with the borrowing of the

money, even when coupled with the tender and refusal in March, or afterwards, could have the effect either to defeat or reduce the plaintiff's claim. We may without impropriety suppose him to contend that it would have that effect in one of three ways.

1. That the tender had the effect to vest in the plaintiff a property in the notes tendered.

That view was so fully considered when the case was before us in 1871, that we think it necessary only to refer to what was then said, simply adding that both the Courts and the Legislature have always treated contracts, payable in Confederate notes, as payable in money, and not as contracts for the delivery of specific articles.

2. That the refusal to receive Confederate notes when tendered, was in breach of a binding, though parol, contract to that effect, and entitled the defendant to damages, which might be set off or recouped; or else, entitled him to have the legislative scale applied at some later period than the date of the note.

It is unnecessary or premature to consider what might be the effect of the alleged agreement, if it had been incorporated in the note, or even if it had been in writing. A preliminary question is, was parol evidence admissible to prove it, and this question must be considered, both upon general principles, and as affected by the statutes of 1865–'66 and 1866–'67. *Upon general principles*, without referring to text books for the general principle, that a written contract cannot be varied by parol, the case of *Smitherman* v. *Smith*, 3 D. & B. 89, may be cited as illustrating it under facts something like the present. There the plaintiff sued the defendant as endorser of a note. Defendant pleaded accord and satisfaction, and proved that at the time of the endorsement, it was agreed by parol between him and the plaintiff, that he
(249) should convey a certain piece of land to the plaintiff in satisfaction of the endorsement, and that he had so conveyed, and that plaintiff had accepted the deed. The question was upon the admissibility of the evidence. Judge Daniel delivered the opinion of the Court, and said in substance, that if the evidence had been given to vary the written contract of endorsement, it would have been incompetent; but as its purpose and effect was merely to show that plaintiff had accepted the deed in satisfaction, it was competent.

The case is like the present, except that the fact which made the evidence competent there, is wanting here.

The Judge certainly erred in holding this part of the proposed evidence immaterial. If allowed, it would have materially altered the written contract, in this, that while the note professed on its face to be payable immediately, the alleged contract made it payable at any indefinite time, at the option of the maker. If affected by such a contract, when could a holder sue on it without being defeated? We think the evidence was inadmissible on the general principle. As affected by the ordinance of 1865, and the Acts of 1866 and 1866–'67.

The ordinance enacts, that all executory contracts solvable in money, made between certain dates, shall be deemed to have been made with the understanding that they were solvable in money of the value of Confederate currency, according to a scale which the Legislature was required to furnish, *subject to evidence of a different intent of the parties to the contract.* The first section of the Act of 1866, ch. 38, is loose and ungrammatical, but it must be understood to enact, that as to contracts of the sort above mentioned, proof might be admitted of the consideration, and the jury should determine its value in the present currency. These acts, in connection with that of 1666–'67, ch. 64, p. 62, being *in pari materia* have been construed together, and the interpretation which this Court has put upon them, and the extent to which in our opinion, parol evidence may be admitted to vary the written contract, is found in *Robeson* v. *Brown*, 63 N.
(250) C., 554. These acts do allow parol evidence to vary the written contract.

1. When the consideration of the promise to pay money was a sale of property, to show the value of the property, thereby in that case, varying the contract as to the amount to be paid.

2. When the consideration was either a sale of property or a loan of money, to show that payment was agreed to be made not in Confederate money, as was presumed, but in some other money or article. But whenever it appears that the agreement accorded with the presumption, and payment of a loan of Confederate money was to be made in that money, the Act of 1866–'67, ch. 64, p. 62, imperatively applies the scale at the date of the contract. It may be that it would have been more in accordance with the intention

to have applied the scale when the money became payable, but the law is otherwise. *Erwin* v. *W. N. C. R. R.*, 65 N. C., 79, differs from this case. There the whole contract was in parol, and the money was to be paid in advance, or whenever the *creditor* would call for it. The plaintiff, in that case, was seeking to take advantage of his own neglect. We do think that in case, parol evidence has been received to prove that a note was payable at a time different from that expressed on its face, or that the scale was to be applied at a time different from that fixed by the Act of 1866–'67. We think these acts do not take the evidence out of the general rule.

The only way in which it may be supposed available without varying the written contract, is as a set-off. We are not called on to, and do not express any opinion, as to whether defendants could maintain a distinct action on the alleged agreement, either on legal or equitable grounds. The question before us, is whether damage for the breach of it can be ascertained and set off in the present action. And it must be remembered, that the present action is not governed by the Code of Civil Procedure, and that section 101 of that act, does not apply to it. If it did, the question would be
(251) different. But the present action is governed by the old practice, and nothing can be a set off or defence in it, which was not so in an action at law before the Code. (*Teague* v. *James*, 63 N. C., 91; *Valentine* v. *Holloman*, *Ibid.*, 475.) With this in mind, we refer to the case of *Lindsay* v. *King*, 1 Ire., 401, as an authority that the agreement here alleged, even if in writing, would not have availed the defendants as a set-off. There the action was brought on a covenant by defendant to deliver to plaintiff certain specific articles. The defendant offered to prove that at the time he executed the covenant sued on, the plaintiff executed a covenant to deliver to him other specific articles, which covenant the plaintiff had broken to his damage, and that the one covenant was the consideration for the other, and claimed to have in some way, the benefit of his claim for damages against the plaintiff, in reduction of the plaintiff's claim for damages against him. Gaston, J., takes up successively every ground upon which it was contended that he could be entitled to such reduction, and decides against them all.

We concur with the Judge below, that a part of the evi-

dence offered was immaterial, and we think that the other part was incompetent.

The exceptions of the defendant are not sustained and the judgment below is affirmed.

PER CURIAM. Judment affirmed.

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(252) R. H. BATTLE, receiver, etc., *v.* S. W. DAVIS.

1. A Court of Equity has the power to appoint a receiver for the purpose of securing and protecting property which is the subject of litigation. He is an officer of the Court and his possession of the property is the possession of the Court. He holds such property as a custodian, until the rightful claimant is ascertained by the Court, and then for such claimant.
2. A receiver cannot commence any action for the recovery of property without an order of the Court and when such order is made, the action must be brought in the name of the legal owner, and he will be compelled to allow the use of his name upon being properly indemnified out of the estate and effects under the control of the Court.
3. The power of a receiver to bring an action is regulated by the rules of a Court of Chancery. An order to sue in his own name cannot be given by our Courts, and the United States Courts cannot confer upon him greater powers or privileges as a suitor in the State Courts.

This was a civil action tried at a Special Term, January, 1872, of Wake Superior Court, before Watts, Judge.

The complaint alleges: That the North Carolina Mutual Life Insurance Company was a corporation created, organized and existing under the laws of North Carolina.

That the defendant Davis made his promissory note to said corporation, by which he promised to pay the sum of $450.80, in the currency of the United States.

That in a certain suit, in the Circuit Court of the United States for the District of North Carolina, in which Sansom and others were complainants and the N. C. M L. I. Co. were defendants, a certain decree was made, and among other things is the following, viz.: "It is therefore ordered, adjudged and decreed, that R. H. Battle, Sr., be appointed receiver of the assets of the North Carolina Mutual Life Insurance Company, and that upon his executing bond, etc, the assets of the said company shall be placed in his possession, and he shall proceed to collect the *choses in action* (253) which may come to his hands, and for such purposes he is authorized to commence and prosecute suits in the Courts of the State of North Carolina." The complaint further alleges that the plaintiff complied with the orders of

the Court, gave bond, etc., and that as such receiver he is vested with, and possessed of, and entitled to the promisory note made made by the defendant as aforesaid. Demands judgment, etc.

To this the defendant demurred :

I. That complaint does not state facts sufficient to constitute a cause of action.

II. That the plaintiff, according to the facts stated in his complaint, has no right to bring this action in this Court.

Upon argument the demurrer was sustained and the suit dismissed.

Plaintiff appealed to the Supreme Court.

Fowle & Badger and *Battle & Sons*, for the plaintiff, filed the following brief:

Can a receiver appointed under a decree in the Circuit Court of the United States, to collect the assets of a corporation for its creditors, sue in his own name in our Courts?

I. The decree of the Circuit Court must vest the title, *legal* or *equitable*, in the receiver, and since the distinction between the Courts of Law and Equity was abolished, it can make no difference.

The assignee of an account or a bond *not negotiable*, now sues in *his own* name.

Here the receiver alone can receive and give receipts for the agents.

II. A receiver appointed in the Courts of another State, may sue in his own name in New York. Vorhies' Code, pp. 120 and 436; *Runk* v. *St. John*, 29 Barb., 585; *Hoyt* v. *Thompson*, 1 Selden, 320; *Porter* v. *Williams*, 5 Selden, 142.

(254) III. Receivers of an insolvent corporation of another State, appointed under the laws of that State, with power to take possession of the effects of the corporation, and to sell, assign, &c., its real and personal estate, have power to sell and assign a debt due from a citizen of New York, in *their own names*, so as to give the purchaser a right of action, *as against the debtor* in the Courts of New York. *Hoyt* v. *Thompson*, 1 Selden, 320.

The above is a well considered case by the highest Court in New York, and is based upon *authority* as well as principle.

IV. That the receivers have power to sue at law by permission of the Courts appointing them, as here, (see Strong's

Eq. Jur. sec. 829, *et seq.*, Dan'l Ch. Prac., 1977 and 1991; *Parker* v. *Browning*, 8 Paige, 368.

V .That the Comity of Courts permits receivers appointed in one State to sue in another, see *Spratley* v. *Hartford Ins. Co*, 1 Dilton's C. C. Reps., 392.

VI. In our case the receiver is by the terms of the decree appointing him, a trustee for the creditors of the Company, and his trust being determined by the decree, he must be a trustee of an express trust, and to sue in his own name, under C. C. P., sec. 57.

Batchelor, for defendant.

1. The plaintiff is a receiver appointed under the old equity system, which obtained before the adoption of C. C. P. He is not the real party in interest referred to in sec. 55, C. C. P., nor is he the trustee of an express trust under sec. 57, C. C. P.

Nor must he be confounded with receivers under sections 215 and 270, C. C. P.

2. The decree of the Court of Equity is not an assignment, nor does it contain an order for assignment of the note sued on by the plaintiff. If the decree of the United States Circuit Court could assign this bond with the right of ac-
(255) tion on it, without regard to rules of pleading and practice in the State Courts, why could it not change the title to, and right to recover real estate without regard to State laws. The only effect that decree can have, is to order the plaintiff to commence and prosecute suits according to laws governing the Courts where such suits are instituted.

3. The receiver is the mere agent of the Court, and has no *status* except in the Court which appointed him. He acts under its order, and can do nothing without it, "He has no powers except such as are conferred on him by the order for his appointment, and the course and practice of the Court." 2 Story Eq., Juris., sec 833. *Verplanck* v. *Mer. Ins. Co.*, 2 Paige 252. *Sea. Ins. Co.* v. *Siebbins*, 8 Paige 565.

4. The suit should have been in the name of the Insurance Co., which is not dissolved; or 2nd, the debt might have been collected by proceedings in the same Court which having gotten jurisdiction will give the party full relief; or 3d, by making the debtors to the Company parties to the suit in Equity and ordering them to pay into Court—issues as to

validity and amount being, if necessary, submitted to a jury, &c. Daniels Ch. Pl. and Pr. 1991 and 1977, 2 Story's Eq. Jur. secs, 827, 828.

Riggs v *Johnston county*, 6 Wallace, at page 187 and cases cited; *Hamlin* v. *Hamlin*, 3 Jones Eq. 191.

"It is to be observed" * * * * * * * "to make use of the name of the party to whom such debt is legally due." 3 Daniel's Ch. Pl. and Pr. 1977 and 1971, *Parker* v. *Browning*, 8 Paige, 388.

DICK, J. A Court of Equity has the power of appointing a receiver for the purpose of protecting and securing property which is the subject of litigation. A receiver is an officer of the Court, and his possession of property is the possession of the Court. The Court has control over the parties to a suit and can order them to deliver property in controversy
(256) to its officer, and if they fail or refuse to obey such order they may be proceeded against by process of contempt.

If the property in controversy is in the possession of a third person who claims the right of possession, the plaintiff may make him a party to the suit and thus render him subject to an order of the Court in regard to delivering such property to the receiver. *Parker* v. *Browning*, 8 Paige, 388.

The order appointing a receiver and giving him possession does not in any manner affect the title of the property, but he holds it as a mere custodian until the rightful claimant is ascertained by the Court, and then he holds for such claimant. 4 Maryl. R., 80; 3 Maryl. Ch., 280.

A receiver cannot commence any action for the recovery of outstanding property without an order of the Court and when such order is made the action must be brought in the name of the legal owner and he will be compelled to allow the use of his name upon being properly indemnified out of the estate and effects, under the control of the Court. 3 Dan'l Ch. Pr., 1977, 1991.

The practice of the Court of Chancery in England on this subject, is well settled by many authorities, has long been the course and practice of our courts, and has not been materially changed by the Code.

Our attention has been called to the practice in New York, in matters of this kind, and we find upon investigation that the common law powers of receivers have been greatly en-

larged by Statute, and they may bring an action in their own name for the recovery of property which they have been directed by an order of Court to reduce into possession. Dan'l Ch. Pr. 1988, note 2. 2 Paige, 452. 4 Paige, 224, 1 Tif. and Smi. Pr., 160. Vorhies' Code, 432.

The case of *Hoyt* v. *Thompson*, 1 Selden, 320, commented upon by plaintiff's counsel, does not sustain their position. The plaintiff in that case was the assignee of a receiver appointed by a Court of Chancery in New Jersey, under a Statute of that State expressly authorizing such Court in
(257) certain cases to appoint receivers, "with full power and authority to demand, sue for, collect and recover, &c., and sell, convey and assign all the said real and personal estate, &c."

The power of a receiver in this State to bring an action is regulated by the rules in a Court of Chancery, and if the order under which the plaintiff has acted, had been made by one of our Courts, he could not maintain this action; and certainly an order made by the U. S. Circuit Court cannot confer greater powers and privileges upon a suitor in our Courts. It is therefore unnecessary for us to consider the question of comity between the State and Federal Courts which was urged on the argument.

We take pleasure, however, in saying, that upon all proper occasions such comity will be extended, as in accordance with judicial usage, and the laws of the land. We concur in the opinion of His Honor, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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(258) McKESSON and HUNT *vs.* JONES, MENDENHALL and CARTER.

1. Where a note was given in 1863. payable two years after date, and *to be paid "in the current funds of the country when due," Held*, that the Act of 1866-'67, which raises the presumption that all contracts to pay money, made during the war, were intended to be payable in Confederate money, cannot apply where the writing itself shows a different intent. When the contract is to pay so many *dollars*, evidence may be received to show that the real agreement was to pay in some other money than Confederate currency.

2. When the makers of a note, given for the rent of land, set up as a defence to the action, that the payees in said note had no title to the land, and no right to lease the same, and it was replied, that the guardian of the real owners of the land had, since the lease was given, ratified

the same by receiving payment, and had entered a *retraxit* in a suit brought against one of the occupants under the lease; *Held*, that such replication was sufficient to defeat the defence relied on.

3. The mere fact that there is a paramount title outstanding, or claim set up against the tenant by the true owner, will not authorize him to dispute the title of his landlord. He must have been compelled to make some payment to the true owner, to avoid an eviction, and such payment is regarded as a payment to the landlord, and to be deducted from the rent.

4. If a note be given for the lease of a tract of land, and it appears that the purpose of the lease was to raise food for laborers employed to make iron for the Confederate Government; *Held*, that such a note is not illegal and void on that account; the Courts cannot take into consideration such indirect and remote consequences.

5. When in an action upon such note, one of the plaintiffs is introduced as a witness, and it is proposed to ask him whether he did not know the purpose of the lease; *Held*, that such question is immaterial, as it could make no difference whether the plaintiffs knew, or did not know the purpose of the lease.

Roberson v. *Browne*, 63 N. C., 554. *Howard* v. *Beatty*, 63 N. C., 559. *Hilliatd* v. *Moors*, 65 N. C., 540. *McKesson* v. *Mendenhall*, 64 N. C., 502. *Martin* v. *McMillan*, 63 N. C., 486. *Phillips* v. *Hooker*, Phil. Eq., 193, cited and approved.

Civil action tried before Mitchell, Judge, at Spring Term, 1871, of Burke Superior Court.

The following is a statement of the case made out (259) by the presiding Judge:

"This was a civil action on a bond, made 14th November, 1863, payable two years after date, in the current funds of the country when due." The consideration of said bond, was the lease of a tract of land belonging to the heirs-at-law of J. S. C. McDowell, deceased.

Defendants admitted the execution of the bond, but relied on several defences set forth in their answer.

1. That the plaintiffs could only recover, if at all, the actual value of the rents and profits of the said land for the term.

2. That plaintiffs could recover, if at all, only the value of the nominal amount of the bond at the time of its execution, and that was the understanding of the parties at the time of its execution.

3. The consideration of the bond was illegal, the land having been leased to the defendants for the purpose of raising and furnishing supplies for detailed laborers employed by the defendants in manufacturing iron for the Confederate Government, under a contract with said government, which fact was well known to plaintiffs when the land was leased.

4. Plaintiffs represented at the time of executing the bond, that they had full right to lease, claiming under a lease from Hon. Charles Manly, who was guardian of the minor heirs of J. S. C. McDowell. Whereas, in fact, there was no rightful guardian at the time, and Mrs. McDowell, has, since the expiration of the lease, been appointed guardian of said heirs.

5. That Mrs. McDowell, guardian, is entitled to the rents and profits for the term of the demise to the defendants, and has brought suit against the defendant Carter, who was the actual occupant, or tenant during said term, and as a defendant sets up this as a counter-claim.

Plaintiffs reply, denying the first and second allegations of answer. To the third they reply, that the acceptance of rent by the guardian of McDowell's heirs, ratified the loan. To the fourth, plaintiffs reply, they indemnified the own-
(260) ers of the land, by satisfaction to the guardian, Mrs. McDowell, who entered a formal *retraxit* to the suit commenced against defendant Carter, as occupant and tenant of the land. They deny the consideration as alleged in paragraph 3, and especially that plaintiff had any knowledge of the purpose for which the land was leased. They admit that they purported to lease, by virtue of a lease, under Governor Manly.

Defendants proposed to examine testimony to prove the value of the rents during the lease, for which the bond was given.

The testimony was excluded by the Court as irrelevant. The defendants called Wm. F. McKesson, one of the plaintiffs, and asked him if he knew the purpose for which the lands were leased by the defendants, and if they were to raise supplies for detailed laborers, &c. He answered, no. They further asked him if they did not tell him so at the time? Witness answered that he did not recollect that they told him so at the time the bond was given.

The defendant then proposed to prove the declarations of the witness, "that they had told him so."

The question was disallowed and ruled out.

It was in evidence that Mrs. McDowell was not appointed guardian until the year 1866, and after the expiration of the term. She accepted rents from the plaintiffs once during the term, and before her appointment as guardian, and a second time after the termination of the lease and after she had

been appointed. It was also in evidence that Mrs. McDowell had entered a *retraxit* in her suit against Carter for the rents of the land, and it was admitted that this would discharge him.

The Court instructed the jury that if they were satisfied of the truth of the evidence in the case, the plaintiffs would be entitled to their verdict for the full amount of the note in lawful currency. Defendants excepted:

1. To the ruling out by the Court of the evidence by which defendants proposed to contradict McKesson, called as a witness by themselves.

2. Rejection of evidence offered to prove the value (261) of the rents and profits during the term of the lease, in order to reduce the amount of the recovery.

3. Because the Court rejected the application of the legislative scale for that purpose.

There was a verdict for the whole amount of the note. Judgment accordingly, from which the defendants appealed.

Folk and *Busbee & Busbee*, for plaintiffs.
Batchelor and *Bragg & Strong*, for defendants.

Rodman, J. On the 14th of November, 1863, the defendants, who were partners under the name of Jones, Mendenhall & Carter, rented of the plaintiffs certain lands for two years from that day, and to secure the rents made to plaintiffs two promissory notes, the first payable at one, and the second at two years from date. The first was paid on or after maturity in Confederate money. The second is now sued on, and is in the following words:

$4000.

Two years after date we promise to pay W. F. McKesson and Hunt four thousand dollars for that portion of the McDowell land we have rented, the same to be paid *in the current funds of the country when due.*

This 14th November, 1863.

(Signed,) JONES, MENDENHALL & CARTER.

The defendants make several defences, and it will be most convenient to state and consider each separately:

1. They say that at the making of the note it was agreed that it should be paid in Confederate money. Even if such

evidence could be admitted, there does not seem to have been any, but that the first note was so paid. But such payment was consistent with its terms, and has no ten-
(262) dency to show that this note is to be paid otherwise than according to its terms. The Act of 1866–'67, which presumes that all contracts to pay money made during the war, were intended to be payable in Confederate money, cannot apply where the writing itself shows a different intent. Where the contract was to pay so many dollars, and the presumption consequently applied, several recent cases have held that evidence might be received to show that the real agreement was to pay in some other money than Confederate. *Robeson* v. *Brown*, 63 N. C., 554.

But where the contract on its face declares in what currency it shall be paid, we think in no case has parol evidence been received to show that it was payable in some other. The Act of 1866–'67 does not have the effect of making such evidence competent. In *Howard* v. *Beatty*, 63 N. C., 559, the action was upon a note dated 3d of April, 1865, payable twelve months after date in "current money." There was evidence tending to show that it was understood by the parties, that the note was to be paid in specie or some equivalent currency, and not in Confederate money. The Court say, the Judge should have left it to the jury, to find what was the agreement in that respect, and if they found that specie or some currency that should be valuable was intended, the plaintiff should recover the amount of the note payable in present legal currency. Here the note itself states what, in that case, the jury was to find.

The case of *Hilliard* v. *Moore*, 65 N. C., 540, is still more nearly in point, and must govern our decision. There the note was given 20th July, 1864, and payable January 1st, 1866, "in current funds at the time the note falls due." It was held that the plaintiff was entitled to recover the sum expressed on the face of the note, payable as other judgments are in legal tender.

2. Defendants further say, that plaintiffs by their demise impliedly undertook that defendants should quietly
(263) hold the demised premises during the term; but that in fact plaintiffs had no right to let the land; and that since the expiration of the term, the guardian of the McDowell heirs, who were the true owners, has sued the defendants for

their use and occupation during the term, which they may be compelled to pay.

We are not called on to decide whether a recovery in an action of this sort *after the expiration of the term* which the tenant had enjoyed, would be considered an eviction by title paramount, so as to furnish a defense or counter-claim to an action for the rent. We have found no authority on the question, and it was not decided by us in *McKesson* v. *Mendenhall*, 64 N. C., 502. All we did in that case was to permit the McDowell heirs to come in as parties, so that the question could be raised. We are inclined to think that payment of a recovery of the sort mentioned would be a good defense.

The plaintiffs however reply, that although they had at the time of the lease no right to make it, yet the guardian of the infant owners, has since that time ratified the lease by accepting payments from them in satisfaction, and entered a *retraxit* in the suit she had brought against Carter, who was the only one of the defendants whom she had ever sued.

We think this reply sufficient to defeat the defense relied on. The mere fact that there is a paramount title outstanding, or a claim set up against the tenant by the true owner, will not authorize him to dispute the title of his landlord. He must have been compelled to make some payments to the true owner to avoid an eviction, and then he is considered to have made the payments by the consent of the landlord, and they are regarded as payments to the landlord upon the rent, and consequently to be deducted from it. Smith Landlord and Tenant, 129, and note on page 170 Am. edition citing *Graham* v. *Ailsoff*, 3 Exch. 186, and *Jones* v. *Morris*, *Ib.* 742.

3. Defendants further say, that the contract sued on was illegal and void; for that they (the defendants,) had
(264) contracted with the Confederate government to furnish it with iron for military purposes; and that many of the laborers employed by them, were detailed for their service by the said government; and that the land was rented by the defendants for the purpose of raising food for the laborers so employed; all of which the plaintiffs well knew.

The farthest this Court has ever gone in holding a contract illegal as being in aid of the rebellion, was in *Martin* v. *McMillan*, 63 N C. 486. There the plaintiff sold to the defendant, who was an agent for the Confederate government to buy mules, certain mules, and took his note for the price. The action was on the note, and the contract was held illegal.

In the present case the aid given to the rebellion was much more indirect; it was at best two steps farther off. It was not a sale of military material, nor even a sale of provisions to laborers engaged in making such material, but a lease of land upon which provisions might be raised, which might be applied to feed laborers engaged in an unlawful occupation.

It is well known that during the late war every cultivated field in the South was made to pay its tithe to the support of the Confederate army. Were all leases of fields, therefore, illegal?

This Court said in *Phillips* v. *Hooker*, Phil. Eq. 193, that the mere fact that a certain act tended indirectly to aid the rebellion, would not, if it were done in the ordinary course of business, vitiate it; and on that principle it sustained contracts of which Confederate money was the consideration.

It is possible to foresee and calculate the direct consequences of an act. If we attempt to follow it out into its indirect and more remote consequences, our reasoning becomes soon uncertain, and after a few steps altogether unsatisfactory. When we confine ourselves to direct consequences, we feel that we are treading on tolerably firm ground; but if we go farther, there is no telling into what calculations of remote and merely possible consequences we may not be compelled to plunge.

This case affords an instance of how uncertain are all
(265) calculations on remote consequences, for if the plaintiffs intended that the crops made on the rented land, should feed laborers engaged in making iron for the Confederate government, in point of fact they did not so go, for before the crops were raised that Government had ceased to exist.

4. Defendants introduced the plaintiff McKesson, as a witness, and asked him if he did not know the purpose for which the land was rented, and that such purpose was to raise supplies for their detailed laborers. He said he did not. He was then asked if defendants did not tell him so? He said he did not recollect it. Defendants then proposed to prove by other witnesses the declaration of McKesson, that defendants had told him so. This evidence being objected to, was excluded by the Judge, and defendants excepted. In the view we have taken of this case, the evidence was irrelevant, as it made no difference whether the plaintiffs knew of the purpose for which the land was rented or not. It was therefore properly excluded.

5. Evidence of the value of the occupation was properly rejected for the reasons heretofore given.

There is no error in the proceedings.

PER CURIAM. Judgment affirmed.

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(266)

J. N. HARSHAW *et al.* Executors of JACOB HARSHAW *v.* WM. F. McKESSON, *et al.*

1. A Court of Equity will never decree a foreclosure of a mortgage until the period limited for payment has expired. It cannot shorten the time given, by express covenant and agreement between the parties, as that would be to alter the nature of the contract to the injury of the party affected.
2. When a mortgage is executed, and it is stipulated that if the mortgagor "shall well and truly pay and discharge said debts according to agreement—the one-third part in three years, one-third in four years, and the remainder in five years from date, then the said deed to be void;" *Held*, that said mortgage cannot be foreclosed until the last period mentioned, viz: five years.
3. If the said deed had stipulated that the estate should be forfeited on the failure to pay the specified installments of debts, then on said failure the mortgagee could have called for his money and proceeded to foreclose.
4. Where a bill to foreclose a mortgage is filed against several defendants, some of whom claim a portion of the lands described in the pleading, under a prior mortgage, and they do not ask that the same be sold, *Held*, that it is error to decree that said mortgaged premises be sold for the benefit of said defendants.

This was a civil action tried before Mitchell, Judge, at Fall Term, 1871, of Burke Superior Court.

One of the defendants, William F. McKesson, executed a mortgage to plaintiffs' testator, for several tracts of land lying in Burke and the adjacent counties, and a house and lot in the town of Morganton, to secure certain debts mentioned in the said mortgage.

The condition of the mortgage is as follows, viz: "Now, if the said Wm. F. McKesson, shall well and truly pay and discharge said several debts according to the agreement now made—the one-third part thereof in three years, one-third part in four years, and the remainder in five years from this date, then this deed to be void and at an end, otherwise to remain in full force and virtue." "It is understood that if the said McKesson choses to pay a part of said

(267) debts, at any time, it will be received." Said mortgage deed is dated February 5th 1867. Registered February 6th, 1867.

The summons in this case were issued February 10th, 1871. Service was accepted by some of the defendants in February, 1871, and process executed on the others shortly thereafter.

There was a prior mortgage of some of the lands included in the mortgage to plaintiff, made to the defendants Woodfin, C. F. McKesson and Annie F. McKesson, since married to defendant Busbee. There was a reference to a commissioner to state account. A report was made and confirmed by the Court.

The case was heard at the last term of Burke Superior Court, upon the complaint, answers, exhibits, plea and report of commissioner. His Honor rendered judgment that the lands included in plaintiffs' mortgage be sold upon certain terms mentioned in the said judgment, and also that the house and lot in the town of Morganton, and tract of land included in the prior mortgage to the defendants, abovenamed, be sold and proceeds applied to the payment of their debt.

From this judgment and order of the Court the defendants appealed.

Battle & Sons, for plaintiff.
Armfield, Folk and *Busbee & Busbee*, for defendants.

DICK, J. The mortgage executed by the defendant, William F. McKesson to Jacob Harshaw, fixes the time of payment of the debts secured, at three, four and five years in equal installments.

This action was commenced before the time of redemption had expired, and one of the questions presented for our decision, is, whether this action can be maintained?

A Court of Equity will never decree a foreclosure until the period limited for payment of the money be passed, and the estate in consequence thereof forfeited to the mort-
(268) gagee, for it cannot shorten the time given by express covenant and agreement between the parties, as that would be to alter the nature of the contract to the injury of the party affected. 3 Powell on Mort., 965.

If this mortgage had expressly stipulated that the estate should be forfeited on the failure to pay the specified instalments of the debts, then on said failure the mortgagee might have called for his money, or proceeded immediately to foreclose. 2 Eden, 197. The time of payment being delayed

was evidently the inducement which caused the mortgagor to enter into the contract, and the security thus furnished, was satisfactory to the mortgagee. The fact that the mortgagee did not commence his proceedings to foreclose upon the failure of the first payment shows that he understood the agreement, as is insisted upon by the defendants.

If the agreement of the parties was, that the estate should be forfeited upon failure of the first payment, it could easily have been inserted in the contract.

The plaintiffs, if they had seen proper, might have proceeded in an action at law, to recover the instalments as they became due, but they could not proceed to have a foreclosure until the day of redemption was passed, and the decree of His Honor in this respect is erroneous.

That part of the decree which directs a sale of the land mentioned in the first mortgage to the defendants Charles F. McKesson and others, cannot be sustained. The first mortgagees have not requested a sale, and the plaintiffs have not offered to redeem the first mortgage. The testator of the plaintiff, by express agreement, debarred himself of the right to foreclose his mortgage for five years, and during that period the plaintiffs have no right to redeem the first mortgage, for in an action to redeem the prior mortgage, they would have to ask for, and be entitled to, a decree of foreclosure against the mortgagor. Coote on Mort., 432.

(269) The first mortgagees may at any time, and without judicial proceedings, accept payment of their debts from the second mortgagees, even without the concurrence of the mortgagor—and this will redeem the prior mortgage. *Ibid*, 517.

As this action was commenced before the plaintiffs were entitled to foreclose the mortgage—the proceedings must be dismissed.

PER CURIAM. Judgment reversed.

ELI E. DEAL *v.* D. C. COCHRAN *et al.*

1. If a creditor enters into any valid contract with a principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety. Mere delay on the part of the creditor to sue for or collect the debt, or even his refusal to do so, when requested by his surety, or his express promise of indefinite indulgence, does not discharge the surety.

2. When a creditor held a note given in 1859, and the principal debtor proposed to pay the same in Confederate money in 1863, which the creditor declined to receive, but made an agreement that, if the debtor would postpone the payment, interest should cease "from that time until a demand;" *Held*, that such an agreement did not amount to forbearance for any definite or specified time, nor increase the risk of the surety in any way, and could not therefore discharge him from liability. It would seem that if the agreement had been to forbear until the end of the war, it would have been *nudum pactum*, and therefore not binding.

Pipkin v. *Bond*, 5 Ire. Eq., 91; *Howerton* v. *Sprague*, 64 N. C., 451, cited and approved.

This was a civil action on a note for $372, dated May 6th, 1859, tried before Mitchell, Judge, at Fall Term, 1871, Catawba Superior Court.

The execution of the note was admitted. The defendants introduced testimony to show that the principal in the (270) note proposed to pay the same in Confederate money in 1863, which the plaintiff declined to receive, but agreed with him, that if he would postpone the payment, he (plaintiff) would release him from interest from that time on, and that the proposition was agreed to.

Plaintiff introduced testimony to show that the agreement was different, viz.: that he was to release the interest from the 28th of July, 1863, until the end of the war.

It was submitted to a jury to ascertain the facts; the jury found that the "agreement began on the 28th of July, 1863, and ended on demand of the plaintiff, 28th of Sept., 1868."

The defendant Cochran, "who was a surety," insisted that the agreement between the plaintiff and the principal debtor without his knowledge or consent, discharged him (Cochran) from payment of the debt.

His Honor held otherwise, and rendered judgment against all the defendants for the principal and interest of the note, excluding the interest between the 28th of July, 1863, and the 28th of September, 1868.

Ruled for a new trial; rule discharged. The defendant Cochran appeals from the judgment of the Court.

Schenck and *W. H. Bailey*, for plaintiff.
Bynum and *J. L. McCorkle*, for defendant.

READE, J. It is well settled, that if the creditor enters into any valid contract with the principal debtor, without the assent of the surety, by which the rights or liabilities of the

surety are injuriously affected, such contract discharges the surety. A familiar instance of this is, where a creditor binds himself not to sue for, or collect the debt for a given time; and thereby puts it out of the power of the surety to pay the debt, and sue the principal debtor.

It is equally well settled, that mere delay on the part of the creditor to sue for or collect the debt, or even his
(271) refusal to do so when requested by the surety, or his express promise of indefinite indulgence, does not discharge the surety; because the creditor is not obliged to be active, and because it is the duty of the surety to see that the principal debtor pays, or else to pay the debt himself. *Pipkin* v. *Bond*, 5 Ire. Eq., 91; *Howerton* v. *Sprague*, 64 N. C., 451.

It remains to be seen how these principles affect the case before us.

The plaintiff states the case more strongly for the defendant than the defendant does for himself; and the defendant states it more strongly for the plaintiff than the plaintiff does for himself, which is noticeable liberality.

The jury found not exactly as alleged by either.

The plaintiff alleged that the principal debtor had offered to pay the debt in Confederate Treasury notes, which were depreciated, and which he, the plaintiff, did not wish to take; and he agreed, that if the debtor would postpone the payment, he would not charge any interest "from that time until the end of the war."

The defendant alleged the same agreement, except that according to his allegation, no interest was to be charged "from that time on." The difference is, that the plaintiff alleged that he was not to charge interest until the war was ended, and then he might charge interest; whereas, the defendant alleged that he was not to pay any more interest at all.

If the agreement had been as alleged by plaintiff, that he was not to charge interest until the end of the war, and the agreement had been supported by a sufficient consideration, it might possibly be construed to mean *forbearance of the debt* until the end of the war. And if so, the plaintiff could not have collected the debt of the principal debtor until the end of the war, nor could he have received it of the surety, and allowed the surety to sue the principal debtor, which would have essentially increased the risk of the surety, and would have discharged him.

If the agreement had been as alleged by the defendant,

(272) that interest was to cease "from that time on," without fixing any time, it left the plaintiff free to put an end to the agreement at any time; to collect the debt; and so it left the surety free to pay the debt at any time. The question, was however, left to the jury, and they found that the agreement was, that interest was to cease "from that time, until the demand by the plaintiff."

This, of course, left the plaintiff free to demand payment at any moment, and left both the principal debtor and the surety free to pay at any moment. So that the agreement as stated by the defendant, and the agreement as found by the jury, did not amount to forbearance for any definite or specified time; but left the plaintiff free to demand payment at any moment, and left both the principal and the surety free to pay at any moment, and in no way increased the risk of the surety.

The only effect of the agreement was to insure the benefit of both the principal debtor and surety by releasing the interest If it has so turned out, that by the result of the war, they have had to pay in a currency different from that which was tendered at the time of the agreement, that is only the *accident* and not the necessity of the agreement. And it seems that no injustice results, as the debt was contracted before the war, and was payable in par funds. If any injustice results, it is to the plaintiff, for by the finding of the jury he lost interest from the time of the agreement in 1863 until the demand in 1868.

We have decided the case according to the finding of the jury as to the agreement; but we do not desire to be understood that our decision would have been different upon the facts as alleged by the plaintiff; for even if the agreement had been to forbear until the end of the war, it would seem to have been without a consideration to support it *nudum pactum*, and therefore not binding.

The whole transaction seems to us to have been simply an evasion by the plaintiff of the offer of the debtor to pay
(273) the debt in depreciated currency, which the plaintiff had the right to refuse, and a naked promise on the part of the plaintiff not to charge interest, which he had the right to charge, if he were not put to the disagreeable necessity of refusing the depreciated currency.

There is no error.

PER CURIAM. Judgment affirmed.

THOS. WHITRIDGE *v.* ALEXANDER P. TAYLOR, Assignee, &c., *et al.*

1. The District Courts of the United States have general original jurisdiction in all matters appertaining to the estate of a bankrupt; and they may exercise *extra territorial jurisdiction*, in collecting the estate and adjusting the claims of the creditors of the bankrupt, when the Court of Bankruptcy can fairly and fully determine the rights of the parties interested.
2. In all matters of controversy, when the subjects in dispute are of a local character, the rights of the parties must be determined in the *local* Courts.
3. When a mortgagee, by the terms of the mortgage, has a right to foreclose, when an adjudication in bankruptcy is made, this right cannot be administered by a District Court, sitting as a Court of Bankruptcy in another State. The State Courts can afford a remedy by foreclosure or sale, and at the same time allow the assignee to have the full benefit of the Equity of redemption.

Civil action tried before Logan, Judge, at Fall Term, 1871, of Mecklenburg Superior Court.

The complaint alleges that the defendants, Austin Doll and Joseph Doll, were the owners, as co-partners, of a valuble tract of land in Mecklenburg County. That in 1869, to secure a large debt due the plaintiff, they executed to him a mortgage-deed for said lands, with a condition, "that if the money and interest due, were paid in twelve months, then the said deed should be void, &c."

(274) That the money and interest was not paid as stipulated. That since the mortgage was made, the defendants have been declared bankrupts by the District Court of the United States for the District of Maryland. That the other defendant, Taylor, has been duly appointed assignee in Bankruptcy and has taken a conveyance of all the estate and effects of the said A. and J. Doll.

The complaint demands judgment of foreclosure and a sale of the lands, &c.

Service of process was acknowledged by the defendant Taylor.

At Fall Term, 1871, the plaintiff, through his counsel, asked judgment according to the complaint for want of an answer. *Pro forma opinion.* "Judgment refused for want of information against the assignee in Bankruptcy." From which ruling plaintiff appealed to the Supreme Court.

Jones & Johnston, for plaintiff.
No Counsel for defendants.

DICK, J. The plaintiff, as mortgagee, seeks to foreclose

his mortgage. The mortgage is dated 10th January, 1869, and the time of redemption specified, is twelve months after date. The mortgagors were adjudged bankrupts in the United States District Court for the District of Maryland, and an assignment of all their estate was duly made on the 30th of May, 1871, to an assignee in bankruptcy, the present defendant. This action was commenced in November, 1871, and the question presented by the ruling of His Honor, is whether a Superior Court of this State has jurisdiction of the case.

The Constitution of the United States, Art, 1, section 8, authorizes Congress to establish uniform laws on the subject of bankruptcy, &c. That power was exercised on the 2nd of of March, 1867, by the passage of the Bankrupt Act, and all State laws in conflict or inconsistent with the purposes of that act were at once suspended in their operation upon
(275) such subject. 3 Story Com., 4 and 15; Cooley, C. L., 18; 4 Wall., 411.

By the first section of said act, original jurisdiction in matters of bankruptcy is conferred upon the United States District Courts. The term original is here used to distinguish this from the supervisory jurisdiction of the Circuit Courts given in the second section, but as to State Courts, the jurisdiction of the Courts of Bankruptcy is superior and exclusive for the purposes contemplated, except as is otherwise provided for in the statute.

It is a question not yet determined, whether under the statute, a Court of Bankruptcy can exercise jurisdiction beyond the limits of the district in which the Court is situated. No such jurisdiction is expressly conferred, but the manifest object of the system is to bring all the estate of a bankrupt under the control of one Court, so that all parties interested may be heard, and their claims adjusted, and the assets be distributed by the same judicial tribunal.

In furtherance of this object, an extra territorial jurisdiction must arise by necessary implication, in collecting the estate and adjusting the claims of the creditors of the bankrupt, where the Court of Bankruptcy can fairly and fully determine the rights of parties interested. The Constitution requires the system to be uniform in its operation and benefits, and this cannot be effected unless the Bankrupt Act is construed by all Courts with the liberality usually allowed to remedial statutes. *Mixer* v. *E. O. & G. Co.*, 65 N. C., 552.

Courts of Bankruptcy exercise a kind of equitable jurisdiction conferred by statute, and an assignee is in the nature of a receiver, who collects and holds property under the protection and direction of the Court, until the rights of all parties are sustained and determined.

For this purpose the jurisdiction of the Court extends over the bankrupt, his estate, and all persons who choose to make themselves parties; and all necessary orders may be enforced against parties within the territorial limits of the Court, by powers of contempt. Bump on Bank.

(276) The Bankrupt Act expressly provides that a duly certified copy of the assignment made to the assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for and recover the property of the bankrupt (sections 14 and 16), and he may sue in his own name in the State Courts, and continue legal proceedings, pleading in said tribunal. But in all matters of controversy, where the subjects in dispute are of a local nature, the rights of parties must be determined by actions in the local Courts. Thus, the title and disposition of real estate, where there are adverse claims, cannot generally be determined in a Court out of a State in which the land is situated.

The case before us presents an illustration of this principle. The plaintiff, as mortgagee, had the legal title to the land in question, and was entitled to have a foreclosure of his mortgage, when the adjudication in bankruptcy was made. This right of the plaintiff cannot be administered by the District Court of Maryland, sitting as a Court of Bankruptcy. The State Court can afford a remedy by foreclosure or sale, and at the same time allow the assignee to have the full benefit of the equity of redemption belonging to the estate of the bankrupt. The assignee accepted the summons, and was properly before the Court, and His Honor erred in dismissing the case.

Let this be certified.

PER CURIAM. Judgment reversed.

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(277) HENRY KING *v.* W. & W. R. R. CO.

1. The power of the Courts to declare statutes unconstitutional is a high prerogative, and ought to be exercised with great caution; they should "not declare a statute void, unless the nullity and invalidity of the act, are in their judgment, placed beyond a reasonable doubt;

and such reasonable doubt must be solved in favor of legislative action."

2. The Act of the General Assembly of 1866–'67, entitled "An Act relating to debts contracted during the war," and allowing either party to show on the trial, the consideration of the contract, and the jury in making up their verdict to take the same into consideration, is not unconstitutional.

3. Therefore, it was not erroneous in a Judge to instruct a jury that in making up their verdict they might consider the value of the article sold—notwithstanding there was an agreement, that the price should be paid in Confederate currency.

Robeson v. *Brown*, 63 N. C., 554, *Hilliard* v. *Moore*, 65 N. C., 540, cited and approved.

Civil action tried before Watts, Judge, at Spring Term, 1871, of Wilson Superior Court.

This action was brought by the plaintiff to recover of the defendant the value of a certain quantity of wood. It was proved by the plaintiff that his testatrix on the 18th day of July, 1864, sold to the defendant 583½ cords of woods, and on the 1st day of February, 1865, 422½ cords, at $1.10 per cord, and that it was agreed that the price should be paid in Confederate currency. The counsel for the defendant asked the Court to instruct the jury that the plaintiff according to the contract, was only entitled to recover according to the scale, the value of the Confederate currency, and not the value of the wood.

The Court declined the instructions, and directed the jury to return a verdict for the value of the wood, which was proved to be fifty cents per cord, and the jury accord-
(278) ingly assessed the value of wood at $503, and judgment was rendered for the same.

The defendant alleged that the Court erred:

1. In refusing the instructions asked for.

2. In instructing the jury to return a verdict for the value of the wood.

Motion for a new trial. Motion overruled. Judgment. Appeal to the Supreme Court.

Battle & Sons, for plaintiff.

Moore & Gatling, for the defendants, filed the following brief:

1. The contract (verbal) made in July, 1864, was "$1.10 per cord, to be paid in Confederate money." This was the general currency at that time, and its value, compared with coin was $21 in currency for $1 in coin.

2. Had it been paid on the day after the contract, the contract would have been fulfilled in spirit and letter.

3. An unwritten contract, after its terms are fixed, is as much protected by the Constitution of the United States as one that is written with a fixed meaning.

4. An obligation to pay in Confederate currency is a lawful contract, and is protected in like manner as an obligation to pay in coin of the United States. Currency is money in the usual acceptation of the term. *Thorington* v. *Smith*, 8 Wall., 1.

5. This is an "executory contract, solvable in money." The ordinance of 18th October, 1865, declares that "all executory contracts, solvable in money, whether under seal or not, made after the depreciation of Confederate currency before May 1, 1865, shall be deemed to have been made with the understanding that they were solvable in money of the value of said currency," etc., sec. 3. See Acts of 1866, chs. 38, 39, pp. 98, 99, and 1867, ch. 44, p. 62.

(279) 6. The ordinance was never intended to alter to vary the contract. Such object was forbidden by the Constitution of the United States. Its purpose was to open the door, and allow evidence at law on all such contracts, instead of driving the parties into Equity. Besides the costs and delay of such a proceeding, the sums, in most cases, were too small to allow its jurisdiction.

7. The scale was adopted, not to *alter* the contract, but conveniently to give general information of the degree of depreciation at different times. It does not prevent any person from controverting its correctness, who may think it does not speak the truth.

8. It differs, in this respect, from the scale of 1780. *Rev. Code* of 1820, ch. 189. This act absolutely regulated the value of *Continental* money from December, 1776, to the close of the year 1782. S. 1, 2 and 4. License, however, was allowed to ascertain by evidence the meaning of the contracting parties as to debts payable *in future*. Sec. 4. In all other matters the act was mandatory without regard to the intent of the parties. There was no Constitutional inhibition by the United States to do this. It was ever construed as mandatory. 1 Hay, 183, Anon; *Winslow* v. *Bloom*, *Ib.*, 217; *Ib.*, 384, Anon.

9. During the period of depreciation of *Confederate* currency, all executory contracts, solvable in money of any kind,

whatever may be their consideration, whether for *land* or the loan of Confederate *money*, fell under the presumption that they were dischargeable in Confederate currency or money of the value of that currency, unless other currency be named. And so long as this presumption continues, or whenever it shall be established, after controversy, that Confederate money was the currency intended, the scale must be applied in order to arrive at the true value of the contract.

10. If the parties, in their contract, had reference to Confederate currency as the value of the consideration, the contract must be construed in the same manner as if they
(280) had expressly named that currency. To hold otherwise is to *impair* the contract.

11. However inadequate the price of an article may seem to the Court, when it is ascertained that the parties intended it should be solvable in money of the value of Confederate currency, that price is the law of the Court, because it is the law of the parties; and all relief from apparent hardship is as much forbidden, as if the parties had, in their contract, estimated the value of the currency and allowed the obligation to be solved in the one or the other at their estimated value.

I submit a brief review of the cases upon the subject. Notwithstanding the comprehensive language of the ordinance, the cases of *Robeson* v. *Brown*, 63 N. C., 554, and *Maxwell* v. *Hipp*, 64 N. C., 98, assert that "the ordinance applies only to contracts, when Confederate money was the consideration. In all other cases of contracts, the value of the property or other consideration, may be shown in evidence, and the jury must estimate such value in United States Treasury notes."

The cases of *Dancy* v. *Braswell*, 64 N. C., 203; *Williams* v. *Rockwell*, 64 N. C., 325; *Parker* v. *Carson*, 64 N. C., 563; *Brown* v. *Foust*, 64 N. C., 672, seem to abandon the actual contract as intended and made by the parties, with a view to regulate it by recurring to the value of the article sold.

Such is the issue made in these cases, instead of making it as to the *kind* of money intended by the parties. In the last of these cases it is held that "the value of the contract is regulated by the Acts of 1866," and not by the intent of the parties.

Laws v. *Rycroft*, 64 N. C., 100, presents a case where, by the evidence before the jury, the intent is so confused, that it was fair to consider the value of the property as a means of ascertaining it.

No exception can be taken to the ruling in this case.

The cases of *Sowers* v. *Earnhart*, 64 N. C., 96; *Garrett* v. *Smith*, 64 N. C., 93; *Cherry* v. *Savage*, 64 N. C., 103; *Green* v. *Brown*, 64 N. C, 553; *Howard* v. *Beatty*, 64 N. C., 59; *Erwin* v. *N. C. R. R. Co.*, 65 N. C., 79; *Haughton* v. *Meroney*, 65 N. C., 124; *Blackburn* v. *Brooks*, 65 N. C., 413; *Hilliard* v. *Moore*, N. C., 540, ascertain the contract and enforce it, regardless of any actual value of the article. And in the last of them, an action for the hire of a slave, it is held that "in 1864, Confederate money was the currency of the country, and if there were no express agreement to the contrary, the law would presume that it was solvable in such currency."

(281)

This case is decisive of the point now before the Court, which presents, not a *presumptive*, but an *express* contract in 1864, "to be paid in Confederate currency."

An intent presumed by law cannot, by any known rule of construction, be construed otherwise than an intent expressed in words.

The precise question has been settled by the Supreme Court of the United States in *Thorington* v. *Smith*, 8 Wall., 1.

In that case the Court, p. 13, speaking of Confederate notes say, "they were the only measure of value which the people had, and their use was a matter of almost absolute necessity. And this use gave them a sort of value, insignificant and precarious enough it is true, but always having a sufficient definite relation to gold and silver, the universal measure of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency. We are clearly of opinion, that evidence must be received in respect to such contracts, in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States."

The claim sued on, was a note for "*ten thousand dollars for value received in real estate, sold and conveyed by deed.*"

Evidence was offered of the value of the land, and

(282) of the currency at the time of the contract. The Court held that the value of the contract was the value of the currency at the time of making it.

DICK, J. The question presented in this case has often been

before this Court, has been fully and ably argued by learned counsel, has received our most mature and deliberate consideration, and has been frequently solemnly adjudicated. *Robeson* v. *Brown*, 63 N. C., 554; *Hilliard* v. *Moore*, 65 N. C., 540, and the intermediate cases.

The construction which we have given to the ordinance and statutes governing contracts, like the one before us, has been adopted by the legal profession, and has adjusted nearly all the business transactions to which they relate, and their operation has almost ceased with the necessities which called them into existence, and they will soon become obsolete by the effluxion of time. The unfortunate and anomolous condition of things which resulted from the late rebellion called for elevated patriotism and the highest wisdom in our legislators Our State government and public institutions; our system of law and social policy; our private fortunes and public credit were all damaged or swept away by a deluge of misfortune, and every man seemed to be catching at the planks of the ship-wreck, regardless of the welfare of his neighbor. Under such circumstances, the Legislature, acting upon the paramount principle, that *Salus populi suprema lax*, enacted homestead provisions, stay laws, amnesty bills, and other remedial statutes, founded upon the broad principles of equity and justice, and intended for the general public good.

The Legislature may not have regarded with critical accuracy and technical precision, the doctrine about "impairing the obligation of contracts" contained in a Constitution which our people had repudiated, and had just made such strenuous efforts to destroy. Our legislators acted in the ex-
(283) ercise of their wise discretion, and their beneficent legislation has been sanctioned by a liberal and enlightened public opinion. The statutes which we are considering have done much good, and will soon cease to have any vitality, and to declare them unconstitutional now, would be like speaking direspectfully of the honored dead.

The power of the Courts to declare statutes unconstitutional is a high prerogative, and ought to be exercised with great caution, and they should "not declare a statute void unless the nullity and invalidity of the Act are placed in their judgment beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the Act be sustained." Cooley on Con. Lim., 102

After so many decisions sustained by legislative sanction and public opinion, we think it would be unwise and unjust to declare these remedial statutes to be void, after their purposes have been nearly accomplished, and in a case in which such an inconsiderable amount is in dispute, and the justice of the matter is with the plaintiff.

We listened with attention and respect to the learned and elaborate argument of the defendant's counsel, on account of the distinguished position which he deservedly occupies as a member of the bar.

We have reconsidered the decisions mentioned in the argument, and think that they are uniform and consistent, and a just interpretation of the legislative will.

There is no error.

PER CURIAM. Judgment affirmed.

(284) RUSSELL H. KINGSBURY *v.* CHATHAM RAILROAD CO.

1. The Act of the General Assembly of 1868–'69, chap. 251, requiring that "the *venue* in actions against Railroad Companies shall be laid in some county wherein the track of said railroad, or some of it, is situated," is not in conflict with sec. 7, Art. I, of the Constitution. The jurisdiction of the Courts, and the *venire* of actions, have always been subjects of legislation.
2. The "repeal of a statute shall not effect any suit brought before the repeal, for any forfeiture incurred, or for the recovery of any rights accruing under such statute." Rev. Code, ch. 108, sec. 1.
3. The question as to where a case ought to be tried, is preliminary to the trial, and must be determined by the Judge. And this question can be as well tried on a motion to dismiss, (the facts being verified by affidavits) as upon a plea to the jurisdiction.

Graham v. *Charlotte and S. C. R. R. Co.*, 64 N. C., 631, cited and approved.

This was a civil action, tried before Watts, Judge, at Spring Term, 1871, of Granville Superior Court.

The action was brought, as appears by the complaint, to recover an amount due for the hire of a slave in the year 1865. At the return term the defendant moved to dismiss the suit "upon the ground that the Court had no jurisdiction, for that the action should have been brought in some county where the track of the Chatham Railroad, or some part thereof, is situated." An affidavit was filed, stating in substance, that no part of the track of the railroad was in the county of Granville, where the suit was brought.

The Court upon argument refused to dismiss. From this judgment the defendant appealed.

M. V. Lanier, for plaintiff.
J. B. Batchelor, for defendant.

READE, J. *Graham* v. *Charlotte & S. C. Railroad Co.*, 64 N. C., 631, was brought in Orange county, and was dismissed upon the ground that said Railroad did not
(285) run in Orange county. It was dismissed under the provisions of the Act of 1868–'69, ch. 257. "The *venire* in actions against Railroad Companies shall be laid in some county wherein the tract of company or some of it is situated." This action is brought to Granville against the Chatham Railroad Co., no part of which lies in Granville, and therefore upon the authority of the case cited above it must be dismissed. The plaintiff's counsel insists that *Graham* v. *Charlotte & S. C. R. R. Co.*, and the Act upon which it is founded, are in conflict with the Constitution, Art I, sec. 7, "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service."

The jurisdiction of the Courts and the *venire* of actions have always been subjects of legislation. It has sometimes been provided that certain actions should be brought in the county where the defendant resided, sometimes where the plaintiff resided, sometimes to either county, sometimes before Justices of the Peace, sometimes in the County Court and sometimes in the Superior Court; and we are not aware that the power of the Legislature was ever before questioned. The novelty of the position is somewhat against it. The *venire* and jurisdiction are regulated for the convenience of administering justice, and not for the purpose of conferring exclusive emoluments or privileges

In the next place, it is insisted that the Act of 1868–'69 was repealed by Act of 1870–'71, chap. 281. Suppose that to be so, this action was commenced before that act and was brought pending the Act of 1868–'69, ch. 257. And then it is provided that the "repeal of a statute shall not affect any suit brought before the repeal, for any forfeitures incurred or for the recovery of any rights accruing under such statute." Revised Code, ch. 108, sec. 1.

In the next place it is insisted that the objection could not

be taken by motion and affidavit, but must be taken by plea, because the plaintiff might desire to have the issue
(286) submitted to a jury as to whether the road was in the county. The answer is that by a counter-affidavit he might have raised the question, and His Honor might have submitted an issue to the jury if he had desired, or might have determined the fact himself.

The question as to *where* the case ought to be tried is certainly preliminary to the *trial of the case*, and must be determined by the Judge. Even if a plea were necessary, then what was done in this case may be treated as a plea. The defendant comes into Court and "submits the following motion to dismiss. The defendant in this case comes into Court and moves to dismiss the suit upon the ground that this Court has no jurisdiction of the matters in controversy for the reason that the said action should have been brought to the Superior Court of some county where the tract of said Railroad Company or some part therof is situated." And then it is verified by affidavit that no part of the Road is in Granville, &c. Now, if these facts had been stated under the *name of a plea* and a motion to dismiss based on them, it is conceded by plaintiff that it would have been proper. There is no difference in substance between pleading the fact and founding the motion on the plea, and making a motion and sustaining it by a plea of verification.

At any rate, the plaintiff had the right to file counter affidavits and raise the question; which he did not offer to do.

THERE IS ERROR. Judgment reversed and the case dismissed.

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(287) J. J. NOBLES *vs.* THOMAS H. LANGLY.

1. When the proprietor of lands, who, for the purpose of draining the same, shall construct a ditch, drain or canal across a public road, it shall be the duty of the said proprietor to build a bridge over said ditch, canal, &c., and keep the same in repair. Rev. Code, chap. 101, sec. 24.

2. Such duty is not incumbent upon the overseer of a public road. Therefore when a civil action was brought against such overseer to recover damages alleged to have been incurred in consequence of his negligently permitting a bridge over a canal to become unsafe and in bad condition; *Held*, that it was competent for him to show that the canal had been dug across the public road by the proprietor of the land adjacent thereto, and for the purpose of draining the same, and that a bridge had been built over the canal by the proprietor of the land, and had been kept up by him several years.

This was a civil action tried before Moore, Judge, at Fall Term, 1871, of Pitt Superior Court.

The plaintiff complains that the defendant was overseer of a certain public road in Pitt county, and had negligently permitted said road to become unsafe and in bad condition, and allowed it to remain so for more than ten days, and that in travelling over said road, and in attempting to cross a bridge on a canal, in consequence of the rotten condition of the said bridge, his horse took fright, and ran off and seriously injured plaintiff in his person, and likewise injured the horse and buggy of plaintiff.

Plaintiff proved that the defendant was appointed overseer of the said road in September, 1868. That he acted as such overseer and occasionally called out the hands to work on said road up to the time of the injury complained of. The plaintiff testified that he was passing over this road in his buggy, on the 11th day of July, 1870, that when he approached the bridge his horse refused to go over, that he got out of the buggy and attempted to lead him over, that there was a small open space on said bridge, that it was broken, and that the horse in passing over, in consequence of the giving
(288) way of a plank, became frightened, ran off and seriously damaged himself and destroyed the buggy.

There was evidence by other witnesses that the bridge was in an unsafe condition and had been so for several months previous to the accident. It was in evidence that the bridge was over a ditch or canal, down which the water from a pocosin passed, and that there had been heavy rains and bad weather previous to the injury complained of.

Defendant then offered to prove that the ditch, or canal, was cut many years ago, by the owner of the swamp to drain the same, and that for several years after the canal was cut, the proprietor of the swamp kept up the bridge, and that the overseer of the road had only occasionally made the hands repair the same.

This evidence was rejected by the Court.

The Court charged the jury that if they believed the evidence the defendant was guilty of negligence. That it was his duty to keep the road in good repair, so as to make it safe and convenient for persons to pass, and that if plaintiff sustained damage in consequence of the bad condition of the road, he was entitled to recover, but if the injury to the plaintiff was caused, not by the bad condition of the road, but by

his own improper conduct, then he could not recover. That if the jury should find for the plaintiff, he was entitled to the amount of his actual damages. There was a verdict for the plaintiff.

Rule for new trial. Rule discharged and defendant appealed to the Supreme Court.

Phillips & Merrimon, for plaintiff.
Battle & Sons, for defendant.

BOYDEN, J. This was a civil action for damages, against an overseer of a public road, in which there was a bridge over a ditch, or canal. The damage alleged was to the
(289) person of the plaintiff and to his buggy and to a horse. The main allegation was, that the bridge over the canal was out of repair, and had been permitted to be out of repair for more than ten days before the injuries complained of had happened, and that these injuries, for which this action had been brought, had been caused mainly by the bridge over the canal on the road being out of repair.

The testimony tended to establish the fact, that the bridge was in bad order and in need of reparation, and had been so for more than ten days, before the injuries to the plaintiff happened.

The defendant denied that it was his duty as overseer to build said bridge, or to keep the same in repair; and alleged that the owner of the swamp above where the canal had been cut across the road, had cut the canal for the purpose of draining his swamp lands above; and that he had built the bridge and kept it in repair for some years. It was the duty of the owner of this land, and not the duty of the overseer, to keep said bridge in repair; and defendant offered one E. P. Daniel, who testified that he had known the road and bridge well—had worked as a hand for several years. Defendant then offered to prove by the witness that the ditch or canal over which the bridge was built was cut many years ago by the owner of the swamp above, in order to drain the same; and that for some time after, the proprietor of the swamp had kept up this bridge over said canal, and that only occasionally the overseer made the hands repair the same.

This evidence was rejected by the Court and the defendant excepted.

By the Act of 1847, *Rev. Code*, chap. 101, section 24, it is enacted, that when the proprietor of lands digs a ditch or canal across a public road, it shall be the duty of said owner or proprietor to build a bridge over the canal thus dug and to keep the same in repair.

It was also proved that the proprietor of the swamp
(290) above the canal was still living and the owner of the swamp above. This can make no difference as this duty clearly would devolve upon the subsequent owner.

When this road was made a public road we are not informed: it might have been early in the settlement of the country.

We think the testimony offered, and rejected by His Honor, tended to prove that it was the duty of the owner of the swamp above, and who cut this canal, not only to build this bridge, but likewise to keep said bridge in repair, and that the law had not devolved this duty upon the overseer.

There was, therefore, error in rejecting this evidence. Let this be certified.

Per Curiam. *Venire de novo.*

H. J. McNEILL and JOHN McNEILL *v.* FLORA RIDDLE.

1. When one in possession of a tract of land, conveys the same in trust for the payment of debts, and afterwards the said land is sold at execution sale, and bought for the benefit of the bargainor's wife, and the said bargainor remains in possession during his life-time and the wife continues the same to the bringing of an action of ejectment; *Held*, that such possession is not adverse to the trustee, nor to the purchaser at the sale under said deed of trust.

2. Where a deed of trust is made to secure certain specified debts, one of which is tainted with usury, and a purchaser buys at the trustee's sale, for valuable consideration, and without notice of the illegality of the consideration of the said debt; *Held* that his title is not affected thereby.

3. If a deed contains a declaration of trust in favor of several creditors, and one of the debts secured is feigned or usurious, and there be no combination between the creditors, to whom the true debts are due, and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declaration of trust in favor of the true debts may not stand, and the feigned debt be treated as a nullity.

Shober v. *Hauser*, 4 D. & B.. 91; *Brannock* v. *Brannock*, 10 Ire., 428, cited and commented on by Boyden, J.

This was an action of ejectment, tried before Bux-
(291) ton, J., at Fall Term, 1871, of Moore Superior Court.

The declaration in ejectment was served on James Riddle (the husband of the defendant), who was in possession, August 6th, 1861.

At Fall Term, 1861, one Tyson was by leave of the Court permitted to come in and defend as landlord of Riddle.

At Fall Term, 1870, by consent of plaintiff and by leave of the Court, Flora Riddle came into Court, and was made party defendant in place of Tyson.

James Riddle, husband of the defendant, did not enter an appearance to the action.

The lessors of the plaintiff claimed title under James Riddle, who executed a deed in trust, dated 18th December, 1858, for the land upon which he was living, to James Cole, trustee, to secure certain debts mentioned in the trust; this deed covered the whole tract owned and occupied by James Riddle.

In February, 1861, the trustee offered the land for sale in two pieces or parcels; one of the parcels was bid off by Joseph Monger, who complied with the terms of the sale; the other piece was bid off by a person who failed to comply with the terms of the sale, and there was a resale of this last piece on the 9th day of May, 1861, at which sale one McNeill became the last and highest bidder for $250; at his request the deed was made to the lessors of the plaintiff. James Riddle continued in possession until his death in 1862.

The defendant's title is as follows: on the 3d day of January, 1861, W. D. Tyson obtained a justice's judgment against James Riddle for $100; on the 22d of January, 1871, he had an execution levied on the whole of the tract of land upon which Riddle was living: the levy was returned to the County Court, and at January Term, 1871, an order was made affirming the justice's judgment, etc.; a *ven. ex.* was issued, and the land was sold at April Term, 1861, and purchased for the benefit of the defendant, who obtained a Sheriff's deed, dated April 26th, 1864, covering all
(292) the land which her husband, James Riddle, had conveyed in trust to Cole.

The defendant resided with her husband on the land, and continued in possession up to the bringing of this action.

It was proved by the Sheriff that when he sold the land in 1861, it was bid off by one Dowd for W. D. Tyson, and that at the request of Tyson, he made the deed to the defendant.

He further stated, that at the second sale by the trustee, in May, 1861, the sale was forbidden by Dowd for Tyson. Upon this evidence the defendant moved to non-suit, upon the

ground that the defendant was in possession at the time of the sale to the lessors of the plaintiff, and at the date of their deed, May 9th, 1861, from Cole, the trustee.

His Honor refused to non-suit, and defendant excepted.

Defendant introduced several witnesses for the purpose of showing that one of the notes secured in the trust, was feigned and usurious, to-wit: a note given to one Seawell, an officer who had executions in his hand against Riddle, and also evidence tending to show that the trustee knew of the illegal consideration of this note. There were other debts named in the trust, which were not tainted in any way.

The defendant asked His Honor to charge the jury, that if the note given to Seawell was illegal and usurious, it vitiated the deed, and rendered it void against creditors. His Honor declined so to charge, but told the jury, that while the agreement between Riddle and Seawell was highly improper, Seawell being a public officer, yet if the lessors of the plaintiff were *bona fide* purchasers for valuable consideration, and bought without notice of the illegality of the note to Seawell, or of any unlawful agreement between the officer Seawell and Riddle, then although that agreement was unlawful and known to the trustee, yet plaintiffs acquired a good title by their purchase.

His Honor also refused to charge "that if the defendant was in adverse possession of the land at the time the lessors of the plaintiff took their deed, plaintiffs could not
(293) recover," deeming that principle inapplicable to the case. The other facts of the case are set out in the opinion of the Court.

No counsel for the plaintiffs.

B. & T. C. Fuller, for the defendant.

Boyden, J. In this case two objections are made to the recovery of the plaintiffs.

1. That the deed of the plaintiffs made by the trustee, Cole, was made while the wife of the bargainor in the deed of trust was in actual possession, claiming adversely to all the world.

The bargainor in the deed of trust continued in possession of the land until his death, after the commencement of this action, and this raises the question, whether the possession of a bargainor in a deed of trust or that of his widow, after

his death, as against the trustee or the purchaser at a sale under the trust, can be set up as adverse, and thereby defeat the operation of the deed, made by the trustee to the purchaser. As to its being the general rule, that such possession is not to be deemed adverse, is too well settled to require the citation of authorities. But in this case it is said, that as the wife before the death of her husband had bid off the land in controversy, under a sale by the Sheriff, and taken a deed for the same, that this rendered his possession adverse without ever having surrendered the possession.

How could this purchase and possession be adverse to the trustee or to the purchaser at his sale? No authority was cited for such a position and we are aware of none.

2. But the main question in the case turned upon the validity of the deed of trust, and it was urged with earnestness, that the deed of trust was fraudulent and void, for the reason that one of the debts mentioned in the trust, to-wit: the bond for $300 to Seawell, the constable, was usurious, for the reason that the original debt for which this bond was given was but $225, and that $75 had been added to
(294) this debt under the following circumstances, to-wit: the constable Seawell had in his hands for collection, claims of different creditors of Riddle, the bargainor in the trust, and had obtained judgment thereon, and had levied upon the land of Riddle, and that he agreed to release the said levies, and to include their claims in the deed of trust with the other creditors of Riddle, by his agreeing to give the constable $75, which sum was included in the bond for $300. And that the bond for the $300 having been given as above stated, was not only usurious but extortionate, and that it rendered the deed of trust absolutely void, although it was made to secure numerous other honest debts which had no connection with the bond for $300, to the constable Seawell, and His Honor was asked to so instruct the jury, which instruction His Honor declined to give, but stated to the jury, that if the lessors of the plaintiff were *bona fide* purchasers for valuable consideration, and bought without knowledge of the agreement between Seawell and Riddle, then although that agreement was unlawful and was known to James N. Cole, the trustee, yet the lessors of the plaintiff acquired a good title by their purchase and deed. Rev. Code, ch. 50, sec. 5.

It is true that in the case of *Shober* v. *Hauser*, 4 D. & B. 91,

this Court did decide that the deed of trust, being tainted with usury, was absolutely void, and that no estate passed thereby. But in that case there was but a single debt, and consequently a deed made to a purchaser at a sale by the trustee, would pass no title, even to a *bona fide* purchaser, without notice. The decision was made in 1838. The Act of 1842, Rev. Code, ch. 50, sec. 5, referred to by His Honor below, changed the law as to purchasers without notice. In this case the sale was without notice to the purchasers, the lessors of the plaintiff, either of the alleged usury, or other unlawful consideration. In the case of *Brannock* v. *Brannock*, 10 Ire. 428, decided in 1846, there were, as in our case, several debts due to different persons, some of which were not tainted with usury, and which were in no wise connected with
(295) those that were.

The present Chief Justice, in delivering the opinion of the Court in that case, says: "The operation of the deed was to pass the legal estate, with a separate declaration of trust, for each of the debts therein enumerated. There can be no reason why the declaration of trust in reference to one debt, may not stand, and a declaration of trust in reference to another be held void. So, if a deed contains a declaration of trust, in favor of several debts, one of which is feigned, and there be no connection or combination between the creditors, to whom the true debts are due, and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declaration of trust, in favor of the true debts, may not stand, and the feigned debt treated as nullity." In our case the trust included all the creditors of the bargainor, including that for which the land was sold by the sheriff and purchased by the defendant.

So it will be seen that the case of *Brannock* v. *Brannock* fully sanctions the charge of his Honor without reference to the Act of 1842.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

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(296) B. S. ATKINSON, Guardian, *v.* WILLIAM WHITEHEAD.

1. A guardian or other trustee is bound only to use such care and diligence in keeping the trust fund as a prudent man uses in keeping his own funds.

2. Where money was stolen from an iron safe, where it had been deposited by a guardian as a trust fund, with his own money and valuable

papers, and the theft was not discovered for several days, and pursuit was made for the thief in a reasonable time: *Held*, that the guardian in such case was not guilty of negligence.

This was a petition filed by the plaintiff as guardian, against the defendant as former guardian of one Atkinson, asking for an account, &c.

The matter was referred to E. A. Dancy, to take and state the account of the defendant, as former guardian. A report was made and exceptions filed. The case comes to this Court upon the exceptions to the report. The referee allowed the defendant credit for the sum of $1,177.88, upon the following state of facts: Defendant had in his possession $1,000 in cash which he held as guardian. He deposited the said sum of $1,000 in an iron safe, which was locked and the key kept in a drawer which was locked, and the key of the drawer was kept by his wife. Defendant had other large sums of money in the safe, viz.: $1,700 belonging to him as administrator, his own money, and five or six hundred dollars in specie belonging to his wife. State and railroad bonds belonging to him as administrator, were also in the safe. On the 15th of April, defendant and his wife left home, and were absent some few hours, leaving the house in the care of a servant—Nelson Clark. On the next day, this servant drove defendant's wife to a point in the neighborhood a few miles distant, where they were to spend the night, and on the succeeding day were to go to Tarboro. Unexpectedly, defendant's wife returned home on that day, and without the servant. The servant was reported as missing. Defendant said to his wife, "Nel-
(297) son Clark is a scoundrel, and I believe he has done something wrong; give me the safe key and let us examine it." His wife laughed at the idea, and remarked that "the safe key was in her drawer, and he could not get it."

The safe was not examined until the 27th day of April, when the defendant, in looking for some papers, discovered that the money, belonging to his ward and himself as administrator was gone. The bonds and specie were not taken. Defendant remonstrated with his wife, and told her he had suspected the servant Clark, and if she had given him the keys the robbery would have been discovered sooner, and the money secured; that he was confident Clark had taken it. Upon consultation with other persons, defendant went in pursuit of Clark, who had been gone eleven days; he went to Richmond and Danville, advertised in the newspa-

pers; offered a reward of $200, and a certain per centum of the money stolen. No discovery was made.

Plaintiff excepted to this item in the report: "That the defendant is allowed $1,177.88, the amount of money and interest alleged by him to have been stolen." The exception was overruled by His Honor W. A. Moore, at the Fall Term of Pitt Superior Court.

Other testimony was taken by the referee, but as the discussion before the Court was confined to the deposition of the defendant, in which the above facts are stated, it is unnecessary to state more.

Warren & Carter and *Phillips & Merrimon*, for plaintiff.
Battle & Sons, for defendant.

READE, J. A guardian or other trustee is bound only to use such care and diligence in keeping the fund, as a prudent man uses in keeping his own funds. And it seems that in this case the fund was so kept up to the time when it was stolen.

(298) The point mainly relied on by the plaintiff was that the defendant did not use due care and diligence in discovering the theft and pursuing the thief. But the defendant had no reason to suppose the money was stolen until he opened the safe and missed it. And then, within a reasonable time, he pursued the supposed thief, but failed to find him; and, indeed, it is mere conjecture who the thief was. But suppose he had caught the supposed thief, or the real thief, sooner or later, the probability that he would have recovered the money is *remote*.

We agree with His Honor, that there was no negligence.

PER CURIAM. Judgment affirmed.

STATE *v.* COLUMBUS ADAIR and others.

1. The 12th section of Article IV, of the Constitution, which provides "the State shall be divided into twelve districts, for each of which a Judge shall be chosen, who shall hold a Court in each county, at least twice in each year, to continue for two weeks," does not by express words, or necessary implication, restrict the Legislature from passing an Act authorizing a Judge under certain circumstances to continue a Court longer than two weeks.

2. Therefore, sec. 397, C. C. P., which authorizes a Judge, "in case the term of a Court shall expire while a trial for felony, etc., is in progress, to continue the same as long as may be necessary for the purposes of the case, is not unconstitutional.

3. Where a witness in a case of homicide stated to another person that she had received several severe wounds, and believed she would die, and desired a neighbor to be sent for; that she wanted to "tell all about it, and who did it:" *Held*, that such statements were competent as confirmatory testimony, and the fact that the witness said she would die, would furnish no ground for their exclusion.

4. It is competent for a magistrate to state what a witness swore before him in regard to the homicide, although he afterwards committed the statement to writing. Such statement could only be referred to, to refresh his memory, and was properly treated as a memorandum.

5. Where one of the prisoners in this case was present and heard
(299) a conversation between the magistrate and his (prisoner's) father, and saw the confusion of the father when a certain statement was made in regard to the principal State's witness: *Held*, that this fact was admissible as confirmatory testimony.

6. After jurors are sworn, but before they are empanelled, it is competent for the Court to allow a challenge for cause.

This was an indictment for the murder of W. H. Steadman *alias* Lee, tried beiore Cloud, Judge, at Fall Term, 1871, of Henderson Superior Court.

Polly Weston, the principal witness on the part of the State, swore that she was the wife of one Silas Weston, that she had four children, the deceased, William Herbert Steadman *alias* Lee, being one of them. That she lived with her husband and these children, in Rutherford County, N. C. That on the night of the 26th of April last, about one hour in the night, she and three children had risen from the supper-table, leaving Silas Weston, her husband, at the table feeding the baby. She heard the growl of a dog in the yard, and went to a crack in the end of the cabin in which they lived, to see what had disturbed the dog. On putting her face to the crack she was fired on, the powder burning her eye, and she staggered back, exclaiming, "I'm killed. God have mercy on me!" The door was then burst open, and Govan Adair, one of the prisoners, as he entered the house, fired on her husband while he was seated at the table, and again as he retreated to the other end of the house. Govan Adair and Martin Baynard, another one of the prisoners, then seized her husband, dragged him down and cut his throat. As Columbus Adair, the other prisoner, came into the house, he fired on David and Theodosia, two of the children, and then shot the deceased. The two first named children were killed instantly. The deceased breathed twice, with a gurgling sound, and exclaiming, "they have killed me!" While the shooting and cutting her husband's throat was going on, witness attempted to get under the bed. Govan

Adair and Martin Baynard dragged her out, and
(300) Govan Adair attempted to shoot her, but his pistol did not fire. He and Baynard then gave her seven severe wounds, leaving her, as they had supposed, dead; they then attempted to cut her infant's throat, set the bedding on fire, and fled from the house. She lay upon the floor, until the flames began to burn her hair, when, finding her infant still alive, she took it and placed it outside the house, returned, and dragged out Theodosia, whom she left lying just outside the burning house, dead, being unable to carry her further on account of a wound in her arm and shoulder. She made her escape to a Mrs. Williams' house, about a mile from the scene of the murder. She gave to Mrs. Williams and her husband substantially the above account of the murder of her family, and related it to others whom she saw that night and next day, pretty much in the same way.

The next morning the house was found in ashes, and the remains of three human bodies, corresponding in size to Silas Weston and the children, were found on the site of the burnt house, and the child Theodosia was found dead with a bullet hole through her breast, and her body burnt and lying where the witness Polly Weston said she had left it, when she escaped from the flames the night before.

In the examination of Polly Weston, defendant insisted that in her narrative she should be confined to the statement of facts connected with the killing of Wm. H. Steadman, and not be allowed to detail the particulars of the other homicides. This objection was overruled by the Court.

Mrs. Williams was examined by the State to prove what Polly Weston had said to her, when she came to her house, on the night of the alleged homicide. She stated, "That Polly asked me to send for Mrs. Morgan, who lived a short distance from witness, that she wanted to tell her all about it, and who did it, before she died, as she expected and believed she would die." Objection was made to declarations of Polly Weston, that "she would die, or expected to die," from the injuries which she had received. The Solic-
(301) itor insisted that it was proper, as confirmatory of Polly Weston's testimony, the defendant's counsel having impeached her testimony in the cross-examination, &c., and she was farther impeached in the course of the trial. This testimony was admitted by the Court.

Hanes, a magistrate, was examined to show what state-

ment Polly Weston had made to him on the next morning after the trial. He said that he swore Polly, but did not then take down her statement; but afterwards, on the same day, wrote it down. He was proceeding to tell what she had said, on oath, about the murder. This was objected to, but admitted by the Court. The written statement was not offered, nor its loss accounted for.

It was also in evidence that when Hanes, the magistrate, went with a *posse* to the house of Henderson Adair, (father of two of the defendants,) the next morning after the homicide, to arrest the defendants, that on being asked the question, "Where was Baynard last night?" and in such a manner as to charge him with participation in the homicides, Govan Adair denied all knowledge of Baynard's whereabouts the night before, and repelled the charge that he had any agency in, or knowledge of the murder.

The State then offered to prove, as a circumstance against Govan Adair, that Hanes and Henderson (the father) were talking in the presence and hearing of Govan, and that Hanes told Henderson that Polly Weston had made *affidavit before him*, who had committed the homicide. And immediately thereupon, Henderson Adair exclaimed, "Is she not dead? Did ever I hear the like?" This was objected to, but admitted by the Court. The State then asked witness what was Henderson's manner when he made the exclamation, "Is she not dead?" This was objected to, but admitted by the Court. Witness stated that Henderson looked confused.

After twelve jurors were tendered and accepted by the prisoners and sworn, but before they were empanelled, the
(302) Court was informed that one of the jurors was related by affinity to two of the prisoners, which appeared upon inquiry to be so, but this fact was not known to the counsel on either side, or to the Court when the juror was sworn. This juror was discharged, to which prisoners' counsel excepted. Another was tendered whom the prisoners took.

The jury were empannelled on Tuesday of the second week of the term, and on Saturday afternoon the case was submitted to them, and they retired to make up their verdict, and not being able to agree, the Judge, on Saturday night, shortly before 12 o'clock, continued the Court, by adjournment, until Monday, and on Monday, the jury being still unable to agree, the Court was continued until Tuesday, and from Tuesday

until Wednesday, when they returned a verdict of guilty, according to the charge in the bill of indictment.

There was a motion for a new trial. Motion overruled. Judgment of death was pronounced by the Court, from which defendants appealed.

In this Court there was a motion in arrest of judgment.

Attorney General and *Coleman*, for the State.
M. Erwin, for defendants.

PEARSON, C. J. The main question in this case is, had the Judge the power to keep the jury together until Wednesday of the third week, and then take their verdict, and give judgment against the prisoners?

This depends upon the question, had the General Assembly the power to enact "in case the term of a Court shall expire while a trial for felony shall be in progress, and before judgment shall be given therein, the Judge shall continue the term as long as in his opinion it shall be necessary for the purposes of the case." C. C. P., sec. 397.

The want of power in the General Assembly to make this enactment is put on Act IV, sec. 12, "The State shall (303) be divided into twelve judicial districts, for each of which a Judge shall be chosen, who shall hold a Superior Court in each county in said district, at least twice in each year, to continue for two weeks, unless the business shall be sooner disposed of."

The power of the General Assembly can only be restricted by an express provision of the Constitution, or by a necessary implication from its provisions; if the terms had been "to continue for two weeks and *no longer*," the restriction would have been express. But no such words are used, and we are at a loss to conceive of any ground for an implication, that a term of the Superior Court should under no circumstances exceed two weeks. On the contrary it is obvious that the duration of two weeks for a time in each county is fixed on, merely to provide for a consecutiveness in the beginning of the terms in the several counties of the district, for the return of process, &c., leaving it to the General Assembly in case of urgency, to make a partial interference with this general arrangement to effect the purposes of justice. That such was the purpose, will appear by reference to sec. 13. "Until altered by law, the following shall be the judicial districts, &c."

So there is no implication beyond that of making an arrangement of districts, and in our opinion the General Assembly had power to make the enactment under consideration.

As to the evidence:

1. The statement of the witness Polly Weston in regard to the manner of the killing of the deceased Steadman, for which the persons were on trial, could not in any way have been disconnected from the circumstances under which the others were killed and she was brutally injured; this is manifest from her statement, which the reporter will set out, and admits of no further discussion,

2. The testimony of Mrs. Williams, as to what Polly Weston said the morning after the tragedy, and among other things that she said "she wanted to tell Mrs. Morgan all about it, and who did it, before she died, as she expected and (304) believed she would die," was competent in corroboration, and the fact that the woman believed she was at the point of death, made her declarations the more impressive, which surely could furnish no ground for their exclusion. It was the ill fortune of the prisoners, that this additional fact made the evidence more telling against them.

3. The testimony of the witness Hanes as to the narrative of Polly was properly received; the circumstance that he afterwards wrote it down, did not affect its competency, and his writing could only have been referred to, for the purpose of refreshing his memory, and was properly treated as a mere memorandum.

4. The fact that Govan Adair was present and heard what his father said, and saw his confusion when told that Polly Weston was not dead, was admissible as a circumstance in corroboration. *State* v. *Smith*, The facts under which it occurred do not bring it within the provision, that after the committing magistrate has examined the prosecution and the witnesses in the presence of the prisoner, he shall take the examination of the prisoner, who shall be first warned as to his rights—what was said and done before Hanes, had no greater or other effect, than if it had occurred in the presence of any other person. The denial of Govan Adair of all connection, &c., and his silence, were subject to no more restraint, and were as free and voluntary as if Hanes had not been a magistrate. His purpose with the *posse* was to make the arrest and not to take the examination of the prisoner.

As the jury was not empanelled and charged with the case,

it was within the discretion of His Honor to allow the State the benefit of a challenge "for cause," so as to secure a jury indifferent, as between the State and the prisoners.

This will be certified to the end, &c.

PER CURIAM. Judgment affirmed.

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(305) EDWARD S. BADGER, Adm'r *de bonis non*, *v.* MARIA L. JONES and J. W. B. WATSON.

1. The rights of an administrator *de bonis non*, relate to the death of the intestate, and he is bound only by such lawful acts of the previous administrator as were done in a due course of administration; for any *devastavit* on the part of the former administrator, the administrator *de bonis non* ought to recover the value of the goods wasted, by an action on the bond of his predecessor: But where the securities on the bond are insolvent, such action would be unavailing and therefore unnecessary.
2. It is the duty of the administrator *de bonis non*, to complete the administration of the estate, by collecting the unadministered assets, applying them in payment of debts, and when there are no personal effects, to obtain license to sell the real estate.
3. The sale of real estate by the heirs-at-law, within two years after the death of the intestate, is void as against creditors and the administrator. Rev. Code, ch. 46, sec. 61, Acts of 1868–'69, ch. 113, sec. 105.
4. A petition to make real estate assets, is a special proceeding, and is properly brought before the Judge of Probate.

Duke, Adm'r, v. *Ferebee*, 7 Jones, 10; *Tate* v. *Powe*, 64 N. C., 644, cited and approved.

Petition to make real estate assets.

This was a petition filed by the plaintiff as administrator *de bonis non*, before the Judge of Probate of Wake county against the heir-at-law and J. W. B. Watson, a purchaser of the real estate of which the intestate died seized, seeking to make the said real estate assets for the payment of debts. The Judge of Probate entered judgment against the defendant. He appealed to the Superior Court, where the case was heard before Watts, Judge, at a Special Term of Wake Superior Court in January, 1872.

The parties agreed upon the following statement of facts:

Rebecca Goodwin died on the 25th day of July, 1863, leaving as her heir at-law and next of kin, the defendant,
(306) Maria L. Jones, who had intermarried with one Benson S. Jones. At November Term of the County Court of Wake, the said Jones was appointed administrator of Rebecca Goodwin, &c., and took possession of the personal

property of the intestate, viz.: of the following slaves, Tiener, 75 years of age and four others, varying in age from 5 to 25 years; fifty shares of Bank Stock in the Bank of North Carolina, and household and kitchen furniture, consisting of such articles as usually belong to a respectable family in the city of Raleigh; that said personal property, exclusive of the slaves, was sufficient to satisfy the debts of the said Rebecca Goodwin; that the administrator possessed himself of the property aforesaid, disposed of the same by sale, and wasted the proceeds.

That he made no return of said property or inventory, as required by law.

That shortly thereafter, the said Jones and his wife left the county of Wake, without having made any settlement with the creditors of the estate, and the said Jones, the administrator, died near Petersburg, Va., in the year 1868, without having fully administered the estate. That on the 9th day of September, 1869, the plaintiff was duly appointed administrator *de bonis non* of Rebecca Goodwin; that the estate was found by the petitioner to be indebted in the amount stated in his petition; that there are no personal assets of the intestate known to the plaintiff to exist, and that he has made diligent search for the same, and there is nothing with which to pay the debts except the land descended to the defendant, and mentioned in the petition.

That the said Benson S. Jones, when appointed administrator, gave bond in $20,000, with W. H. Jones and W. H. Harrison as sureties. That said bond since the termination of the war has been, and is now wholly insolvent.

The said Rebecca Goodwin died seized of a certain lot in the city of Raleigh, known as lot No. 34, which is properly described in the petition and in a deed from Jones and his wife to J. W. B. Watson.

That upon the death of the said Rebecca Goodwin
(307) the said land descended to the said Maria L. Jones, sole heir at law of the said Rebecca Goodwin.

That within two years after letters of administration were issued to the said Benson S. Jones, viz: on the 2d day of January, 1864, the said Jones and his wife conveyed the said lot, No. 34, to Defendant Watson in consideration of the sum of twenty-five thousand dollars in Confederate money, which was a fair price for the same.

That said Watson purchased without notice of the indebt-

edness of the estate—and that said Rebecca Goodwin was not the owner of any other real estate.

Upon this state of facts, His Honor ordered and adjudged that the real estate, &c., described in the petition be sold for the payment of debts.

From which judgment the defendant Watson appealed to the Supreme Court.

Fowle & Badger, for plaintiff.
Young and *Strong*, for defendants.

DICK, J. The sale of the land to Watson was made by the heir at law within two years after the death of the intestate, and is void as against creditors and the administrator. Rev. Code, ch. 46, sec. 61. Acts 1868–'69, ch. 113, sec. 105.

The creditors were under no obligation to receive payment from the former administrator, as the currency of the country at that time was so greatly depreciated.

The rights of an administrator *de bonis non* relate back to the death of the intestate, and he is bound only by such lawful acts of the previous administrator, as were done in a due course of administration of the estate of the intestate. For any *devastavit* on the part of the previous administrator, the administrator *de bonis non* ought to recover the value or the goods and effects wasted, by an action on the bond of his predecessor; but in our case an action would be un-
(308) availing, as all the parties to said bond are insolvent. 1 Williams' Exrs., 824. Redfield on Wills, 91, *Duke, administrator*, v. *Ferebee*, 7 Jones, 10.

It is the duty of the ptaintiff to complete the administration of the estate of his intestate, by collecting the unadministered assets, and applying them to the payment of debts. As there are no personal effects, he has proceeded properly to obtain a license to sell the real estate to make assets; and against him for this purpose, the conveyance of the land to Watson is void. As there is no equitable element in this matter, which under the old system would have required a resort to a Court of Equity for relief, the special proceedings before the Clerk were right as coming within the rule laid down in *Tate* v. *Powe*, 64 N. C., 644.

There is no error.

PER CURIAM. Judgment affirmed.

(309) STATE *vs.* BEVERLY JEFFERSON.

1. An appeal cannot be taken on the State docket from an interlocutory order or judgment.
2. Where a matter involves the power of a Superior Court and error in its exercise, as where, in a capital case, a Judge improperly discharges a jury, and refuses to discharge the prisoner; the record of the Court below may be brought up for review by a writ of *certiorari* in the nature of a writ of error. Art. 4, sec. 10, Const.
3. In such case the proper course is to ask for a rule to show cause why the writ should not issue, and as a foundation for the order the Court will require a petition in due form.
4. In a trial for a capital felony, the Judge for sufficient cause may discharge a jury and hold the prisoner for another trial; in which case it is his duty to find the facts and set them out on the record, that his conclusions upon matters of law, arising upon the facts, may be reviewed by this Court.
5. It is the duty of a Judge to be personally present in Court, and to find judicially the facts upon which his conclusions are based. Judicial power cannot be delegated. Where, therefore, a Judge is absent from the Court, and telegraphs to the Clerk to discharge a jury, and the Clerk so does; *Held*, to be error, and the prisoner in such case is entitled to his discharge.

State v. *Prince*, 63 N. C., 529. *State* v. *Alman*, 64 N. C., 364. *State* v. *Baker*, 65 N. C., 332. *Biggs ex parte*, 64 N. C., 202, cited and approved,

This was an indictment for murder, tried at Warren Superior Court before Watts, Judge, Spring Term, 1871.

The facts upon which the opinion of the Court is rendered are set forth in the following extracts from the record sent to this Court: "And afterwards, on Tuesday of the second week of the said term, the case is given to the jury at 10 P. M., and His Honor, the judge presiding, instructing the Clerk to inform him by telegraph of the agreement or failure to agree of the jury before Saturday night following, departs on the said Tuesday night for his residence in Frank-
(310) lin county. And on Saturday, the last day of the term, the said Beverly Jefferson is again brought to the bar of the Court in the custody of the sheriff, the counsel for the State and prisoner being present, His Honor being continuously absent, and the jury charged and sworn as aforesaid, report to the Clerk of the Court that they have remained together from Tuesday until the Saturday following at 5 o'clock; that they have not been able to agree and do not believe that they can agree.

Thereupon the Clerk of said Court telegraphs to His Honor at his residence in Franklinton, the said declaration

and report of the jury, and shortly thereafter received from His Honor the following dispatch:

FRANKLINTON, N. C., 1871.

To W. A. White:

Let a juror be withdrawn and a mistrial be entered. Discharge the jury and let the prisoner be remanded to prison.

S. W. WATTS, J. S. C.

Whereupon the Clerk withdraws a juror, and a mistrial is entered upon the record. The cause is continued and the prisoner remanded to jail to remain until discharged by due course of law. And at Fall Term, 1871, the counsel for the prisoner moved for his discharge. Motion overruled. Appeal to the Supreme Court."

Upon motion of the Attorney General the appeal from the interlocutory judgment was dismissed.

Attorney General, for the State.
Busbee & Busbee, for defendants.

PEARSON, C. J. It is decided, *State* v. *Bailey*, 65 N. C., 426, that "an appeal cannot be taken on the State docket to this Court from any interlocutory judgment or order."

It follows that the appeal in this case was improvi-
(311) dently allowed and must be dismissed.

But we are of opinion that the question of law in reference to the discharge of the jury, and the motion for the discharge of the prisoner, are fit to be heard in this Court, and that the record of the Court below may be brought up for review by the writ of *certiorari* in the nature of a writ of error. In *Biggs, ex parte*, 64 N. C. 202, it is held that when the matter involves the power of the Superior Court, and error in its exercise, the record may be brought up for review. Under Art. 4, sec. 10, of the Constitution, "The Supreme Court shall have power to issue any remedial writs, necessary to give it a general supervision and control of the inferior Courts."

The matter set out in the record shows probable cause for permitting the prisoner to take a rule on the State to show cause why the writ of *certiorari* should not issue.

This distinguishes it from Bailey's case, for there the matter set out in the record did not show probable cause. We wish

also to distinguish it from *Biggs, ex parte;* for there the allegations in the petition for the writ of *certiorari* were deemed sufficient for the order allowing the writ. Here we require a petition in due form, as a foundation for the order; which is the more regular practice, and was only departed from in that case upon its peculiar circumstances.

The prisoner may take a rule to show cause. Appeal dismissed.

PER CURIAM.

A rule was then granted upon petition filed, to show cause why a writ of *certiorari* should not issue. The order for the writ was made, and it was issued to the Clerk of Warren County, who certified a transcript of the record, the same in all respects, as that which has been set out above.

Same counsel as above.

(312) PEARSON, C. J. The record of the Superior Court is now brought before us by writ of *certiorari*, and upon review this Court is of opinion, there is error. The prisoner is entitled to be discharged. By C. C. P., sec. 397, it is enacted: "In case the term of Court shall expire while a trial for felony, &c., shall be in progress, and before judgment shall be given therein the Judge shall continue the term as long as in his opinion it shall be necessary for the purposes of the case." See *State* v. *Adair, at this term.* By the cases, *State* v. *Prince*, 63 N. C., 529; *State* v. *Alman*, 64 N. C. 364, and *State* v. *Baker*, 65 N. C. 332, it is settled, that in a trial for a capital felony, for sufficient cause, the Judge may discharge the jury and hold the prisoner for another trial. In which case it is his duty to find the facts, and set them out on the record, so that his conclusion as to the matter of law arising from the facts, may be reviewed by this Court.

As the case was given to the jury on Tuesday of the second week of the Term, we are inclined to the opinion, that had his Honor *remained at the Court*, until Saturday night ready to instruct the jury, and then discharged the jury, after Friday, the fact that the case had been with the jury for four days, and that from declarations of jurors, in the presence of the others and in open Court before him, he was satisfied the jury would not agree, and that it was useless and "not necessary

for the purposes of the case" to continue the term longer, and had thereupon discharged the jury, there would have been no error.

But these facts are not found and could not have been found by him judicially; for it is set out in the record, that he left the Court and went to his residence in Franklin County on Tuesday night, "instructing the Clerk to inform him by telegraph of the agreement or failure to agree of the jury before Saturday night following." It is further set out, that on Saturday at 5 o'clock P. M., the Clerk informed his Honor by telegraph, that the jury could not agree, and his Honor instructed the Clerk by telegraph to discharge the jury (313) and remand the prisoner; which the Clerk did.

It was the duty of the Judge to have been personally present in Court, and to find judicially the facts upon which his conclusion to discharge the jury was based.

Judicial power cannot be delegated. This is a fundamental principle of the law. It has been violated. The result is, the prisoner is entitled to be discharged. This Court acting as upon a writ of error, adjudges that the prisoner be discharged and go without day.

PER CURIAM. Judgment reversed.

STATE *v.* DAVID PENDER, *et al.*

1. The power of the Legislature to confer criminal jurisdiction on the Chief Magistrates of towns and cities, stands on a different footing from the power to confer civil jurisdiction.
2. By the 4th section of Article IV, of the Constitution, the judicial power of the State is vested in a Court for the trial of impeachments, a Supreme Court, Superior Courts, and Special Courts; the jurisdiction of Special Courts is defined by section 19, of the same Article.
3. The Acts of 1868–'69, chapter 178, and chapter 2 of the particular Act, section 1, page 432, gives (among other officers enumerated) to Mayors, Superintendents of Police, or other chief officers of cities and towns, power "to cause to be kept all laws made for the preservation of the public peace," etc.; and chapter 3, section 1, of the same Act, gives them power "to issue process for the apprehension of persons charged with any offence, and to execute the powers and duties conferred in this chapter," but no final jurisdiction is given to them by any part of said act.
4. The power thus given to the chief officers of towns, etc., can be supported by the authority given the Legisluture by the Constitution, to create Special Courts for cities and towns, and it can be no objection to the act in question, that it does not authorize these officers to *try* persons charged with misdemeanors, but simply to arrest and bind them over.

5. There is nothing in the Constitution, taken altogether, prohibiting
(314) the Legislature from giving to cities and towns the power of selecting and designating their chief officers.

Cases of *City of Wilmington* v. *Davis*, 63 N. C. R., 582; *Town of Edenton* v. *Wool*, 65 N. C. R., 379, cited and approved.

This was a motion to set aside and vacate a judgment rendered against the defendants as bail of George A. Smith, heard before Moore, Judge, at Fall Term, 1871, of Edgecombe Superior Court.

The facts stated in the record are as follows:

John Norfleet was Magistrate of Police of the town of Tarboro, Edgecombe county, and as such issued the following warrant, viz:

State
v. } STATE OF NORTH CAROLINA.
George A. Smith.

To any Constable or other officer of said County—GREETING:

WHEREAS, Windsor Bilby hath complained on oath before me, a Magistrate of Police for the town of Tarboro, that George A. Smith, did, on the 4th day of October, A. D. 1870, at and in the county and town aforesaid, violently assault the said Bilby, by shooting at him with a pistol, contrary to law, and against the peace and dignity of the State. You are therefore commanded to arrest the said Smith, and have him before me, or some other Justice of the Peace, to answer said complaint and be otherwise dealt with according to law.

(Signed) JOHN NORFLEET, M. of P. [SEAL.]

Upon said warrant is the following endorsement:

State v. *George A. Smith:*

(315) The defendant is this day brought before me, and it appearing that he is guilty (from the evidence); it is adjudged that he be recognized in the sum of $500, with good sureties, for his appearance at the next Term of the Superior Court for Edgecombe county, etc.

JOHN NORFLEET,
Magistrate of Police for Town of Tarboro.

The said Smith gave bond, in the sum required, for his appearance at the Superior Court for Edgecombe county,

with the defendants as sureties. At said Term of the Court the said Smith failed to appear, and judgment *nisi* was entered against him and his sureties. A *scire facias* was issued against them, and at February Term, 1871, the judgment was made absolute. At the subsequent Term, September, 1871, a motion was made to set aside and vacate said judgment, and the Court being of opinion that the said "Norfleet had no jurisdiction of criminal matters to any extent, and that the warrant issued by him for the arrest of the said Smith, as well as all the subsequent proceedings had before him were void," adjudged, that the said judgment be set aside and vacated, from which judgment the Solicitor for the State prayed an appeal to the Supreme Court.

Attorney-General, for the State.
Bridgers & Bridgers, for defendants.

RODMAN, J. The power of the Legislature to confer criminal jurisdiction on the chief magistrates of cities and towns, stands on a different footing from their power to confer civil jurisdiction on such officers. The cases of the *City of Wilmington* v. *Davis*, 63 N. C., 582, and the *Town of Edenton* v. *Wool*, 65 N. C., 379, which relate only to the civil jurisdiction, have therefore no application to the present case.

By the Constitution (Art. IV, sec. 4,) the judicial power of the State is vested in "a Court for the trial of impeach-
(316) ments, a Supreme Court, Superior Courts, Courts of Justices and the Peace, *and Special Courts.*"

What Special Courts are intended to be, is defined by section 19, of the same Article. "The General Assembly shall provide *for the establishment* of Special Courts for the trial of misdemeanors, in cities and towns where the same may be necessary."

The Act of 1868–'69, ch. 178, of the Acts, ch, 2, of the particular Act, section 1, p, 432, enumerates the officers who "shall have power to cause to be kept all laws made for the preservation of the public peace," and to require security to keep the peace, and along with the Judges of all the Courts, including the Judges of the Special Courts then existing, or which might afterwards be created, confers these powers on the "Mayors, Superintendents of Police, or other chief officer of all cities and towns in this State." Chapter 3, section 1, of the same act enumerates the chief officers of cities and

towns among the magistrates who may "issue process for the apprehension of persons charged with any offence, and execute the powers and duties conferred in this chapter." Other sections of this chapter relate to the powers and duties of such chief officers; but no final jurisdiction to try offenders, such as is given to Justices of the Peace, by chapter 4, is anywhere given to them.

The magistrate who issued the process under which the supposed offender in this case was arrested, is the chief officer of the town of Tarboro, and his official title is Magistrate of Police. Private Acts 1821–'32, ch. 66, p. 65.

The question, therefore, is whether the powers granted to the chief officers of the towns by the Acts of 1868–'69, ch. 178, can be supported as an exercise of the legislative power to create Special Courts for the trial of misdemeanors in cities and towns.

It can be no objection to the Act in question, that it does not authorize these officers to try persons charged with misdemeanors, but only to arrest them and bind them
(317) over to the Superior Court. As arrest must necessarily precede trial, the power to try offenders must include the power to arrest them. If the Legislature has not granted in full the power which it had a right to grant, that is no reason why their grant of a part of it shall fail. It is said, that conceding the power of the Legislature to give to the chief officers of the towns the powers of Special Courts, the power must necessarily be limited to the trial of misdemeanors, and consequently to arrest for misdemeanors, the power to arrest and bind over being co-extensive only with the possibility of the power to try; and that thus the anomaly will be presented, of officers authorized to arrest small offenders, but not felons. This objection assumes that the chief officer of a town could not constitutionally be given the power to arrest and bind over felons. The Act of 1868–'69 gives them that power in the case of felons; and if the Legislature can give them such power in minor cases, we do not see why it cannot in graver one, because the arrest and examination of the offender must necessarily precede the determination of the degree of his offence. But that question does not arise in this case, where the offence charged was only a misdemeanor, and is charged to have been committed in the town of Tarboro. We express no opinion on it.

We are led then to inquire whether there is anything in the Constitution prescribing the manner in which Judges of Special Courts shall be designated to office, inconsistent with the manner in which the chief officers of towns are designated, which is invariably, or usually, by the votes of the inhabitants of the towns. Because if there is anything in the Constitution requiring a mode of designating Judges of Special Courts, inconsistent with their election by the town in which the Court is to sit, it will be conceded that the Legislature would be disabled from granting to the chief officer of a town the powers of an officer, constitutionally required to be disignated in a different way from such chief officer.

It is suggested that sec. 10 of Art. III has this effect. (318) That section is as follows:

"SEC. 10. The Governor shall nominate, and by and with the advice and consent of a majority of the Senators elect, appoint all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly."

Does this section include within it Judges of Special Courts, so as to require them necessarily and in all cases to be appointed by the Governor, by and with the advice and consent of the Senate? Because, if it does, clearly it disables the Legislature from giving the powers of such Judge to officers deriving office from an election by a town.

It must be admitted that if this section stood alone in the Constitution, unmodified and unexplained by any other, it would be difficult if not impossible, by any fair course of reasoning, to take Judges of Special Courts out of its operation.

But we think it is modified and restricted by Art. IV, sec. 19, which says: "The Legislature shall *provide for the establishment of* Special Courts for the trial of misdemeanors in cities and towns," etc. The words "*provide for the establishment of*," are very wide, and it seems to us that they not only admit of, but that they cannot receive their full and adequate force, without giving them the interpretation, that they authorize the Legislature to establish the Courts in any way that it may think proper; and to give the Judges such powers (not exceeding the trial of misdemeanors), and to provide for them and the other officers of the Court (if any),

such mode of election, and such terms and emoluments of office as it may think proper. *Possibly*, it cannot give the absolute appointment of officers to the Governor, or their election to the General Assembly; we say this, only to avoid the supposition that we mean to include those modes of election; those modes may be prohibited by sec. 10 of Art III, but we express no opinion on that point.

A Court cannot be established without either creat-
(319) ing the office of Judge of it, or attaching the duties of such office to some other office already in being; and it seems to be a reasonable intendment that to establish a Court includes an order as to the mode of selecting the Judge, his jurisdiction, term of office, and all the other incidents of the Court. If this be so, then the Act of the Legislature in question was within its power.

Few Constitutions are entirely homogeneous in all their parts. That the Constitution of 1868 is not so, cannot be surprising to any one acquainted with its history. It is the duty of the Courts of the State, and one which this Court has endeavored faithfully and impartially to perform, to give to the Constitution such an interpretation as will harmonize its parts without violating any leading idea in it as a whole. Between the two sections which we have had under consideration, there is, at first sight, an appearance of the impres- of different ideas. The draughtsman of Article III probably did not have in his mind that special Courts could be established.

From the language of sec. 19 of Art. IV, (and it is by its language only that we can be guided) we think the leading idea in that was to give the Legislature full power over the establishment of Special Courts, thus making it an exception to the general provision in sec. 10 of Art. III. This is necessary in order to give to the words their *full and adequate* force.

Again, it is suggested that sec. 31 of Art. IV, which provides that all vacancies in offices, provided for by that Article of the Constitution, shall be filled by the appointment of the Governor, unless otherwise provided for, &c, is inconsistent with the proposition, that the Legislature may confer the power of Judge of a Special Court on an officer, the vacancy in whose office the Governor is not authorized to fill, and which vacancy it would be somewhat absurd to think that he might be authorized to fill.

We think this suggestion is of less weight than the

(320) one before considered. We think that this section was not intended to include the office of Judge of a Special Court, which was a thing not within the mind of the Convention at that time. After what we have already said, it is unnecessary to elaborate this point.

We have thus reviewed every suggestion which has been made, and every argument which has occurred to us, against the Act of 1868–'69, as a valid exercise of the legislative power; and we have been unable to find any solid reason why that Act should not be sustained.

We think that the Legislature had the power to grant to the chief officers of cities and towns, all the jurisdiction which they could grant to Judges of Special Courts. At present it has done so partially only. Whether it will hereafter increase their jurisdiction, is for it alone.

There was error in the judgment below, which is accordingly reversed, and the case is remanded to the Superior Court of Edgecombe to be proceeded in according to law.

PER CURIAM. Judgment reversed.

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(321) JOHN W. MARTIN, Executor, *v.* N. D. WILBOURNE *et al.*

1. A trustee, in the execution of his trust, is bound to carry out honestly and faithfully the purposes contemplated by the grantor, to keep an account of receipts, disbursements, &c., and be ready to produce his accounts when required by the parties interested in the estate.
2. Where the facts connected with the management of a trust estate are in dispute, and the rights of the parties cannot be readily ascertained without an account, in such case the rule adopted by Courts of Equity is a reference to the Master, and if there is dissatisfaction with the report, the matter may be brought before the Court by proper exceptions.

This was a civil action, heard before Mitchell, Judge, at Fall Term, 1871, of Wilkes Superior Court.

The complaint alleges that one Wilbourne conveyed to plaintiff's testator a valuable tract of land, in the county of Wilkes, in trust for the defendants, who are the wife and children of said Wilbourne. That the conveyance was a voluntary one, and at the time of the execution of the deed Wilbourne was indebted to various persons. That the trustee, to preserve the estate, paid, with the full knowledge of his *cestuis que trust*, a number of the debts of Wilbourne, and incurred liabilities which are not yet satisfied. That Wilbourne died insolvent in 1865. Complaint asks judgment for an ac-

count, &c. Defendants answer, denying all knowledge of the payment, by plaintiff's testator, of the debts of Wilbourne.

A replication was filed. The cause was heard upon the complaint, answer and replication. Plaintiff asked for an order of reference, which was opposed by the defendant. The Court ordered the reference, and the defendants appealed to the Supreme Court.

Armfield, for plaintiff.
Furches, for defendants.

(322) DICK, J. This is a civil action, brought for the settlement of a trust estate. The case was heard upon the complaint, answer and replication of the parties.

The execution of the trust deed is admitted, but the payments made and the liabilities incurred by the trustee are controverted by the *cestuis que trust*. The merits of the controversy are not before us at this stage of the proceedings, as the only matter appealed from is an order of His Honor directing an account of the management of the trust fund.

A trustee is bound in the execution of his trust to carry out the purposes contemplated by the grantor, with honesty and fidelity; to keep regular and accurate accounts of all receipts and payments made by him in the discharge of his duty, and if the estate in his hands is not sufficient for such indemnity, he can hold the *cestuis que trust* personally responsible. Adams' Eq., 61.

When the facts connected with the management of the trust are in dispute, the rights of the parties cannot be readily ascertained and determined without an account. This is the usual course adopted by Courts of Equity, and if any of the parties are dissatisfied with the report of the Master, the cause of objection can be presented by proper exceptions and thus the Court can decide all matters of controversy.

We think this a proper case for an account, and His Honor was right in making the order appealed from. Let this be certified.

PER CURIAM. Judgment affirmed.

(223) THE SCHOOL COMMITTEE OF PROVIDENCE TOWNSHIP *v.* TOBIAS KESLER *et al.*

1. Where issues to be tried by a jury, are tendered by the plaintiff, and such issues are objected to by the defendant, and others tendered, and the presiding Judge directs those tendered by the plaintiff to be submitted; *Held*, that there can be no appeal to the Supreme Court from such preliminary order.

Rules III, IV and V, adopted by the Supreme Court at June Term, 1871, discussed and fully explained by Pearson, C. J.

Civil action tried before Cloud, Judge, at a Special Term of Rowan Superior Court, January, 1872.

The complaint alleges that the defendant, Tobias Kesler, by a deed bearing date November 27th, 1848, conveyed a certain tract of land in Rowan County, to Samuel Peeler and others, School Committee of the 38th district of common schools, and their successors, &c. That the plaintiffs in this suit, in their corporate capacity, are entitled to the care and custody of said premises, under an Act of the General Assembly, passed April 12th, 1860, &c., and that they were lawfully possessed of the said premises at the time of the trespass committed by the defendants. That the defendants, Trexler and Roseman, at the instigation and request of the defendant Kesler, unlawfully entered upon said premises, and then and there injured a certain school house situated upon the said premises, by carrying off the flooring, a number of benches, &c., &c.

Defendants admit the acts complained of and that they were done at the instance and request of defendant Kesler, who claimed title to the premises.

At the Special Term aforesaid, the plaintiffs, by their attorneys, tendered the following issues of fact to be tried by a jury.

I. Did Tobias Kesler convey the land described in the pleadings, to Samuel Peeler and others, school committee, &c.

(324) II. Were the plaintiffs lawfully possessed of said land at time of the alleged trespass?

III. Did Roseman and Trexler, defendants, at the instance and request of the other defendant, unlawfully enter, &c?

IV. What damage have plaintiffs sustained by the unlawful acts of the defendants?

Defendants' counsel objected to these issues, and tendered the following:

I. Did the defendant Kesler, on the 27th day of November, 1848, sign, seal and deliver to Samuel Peeler, and others,

school committee, &c., a certain paper writing in the words and figures following: * * * *

II. Did the defendants Trexler and Roseman, by the command of Kesler, enter upon the premises and dispoil the same as alleged?

III. If yes, what is the value of the damage?

Whereupon, his Honor ordered the issues tendered by the plaintiff to be submitted to the jury.

From this order the defendants appealed to the Supreme Court.

John S. Henderson, for plaintiff.
W. H. Bailey and *J. M. McCorkle*, for defendants.

PEARSON, C. J. By the common law mode of procedure, the parties made up "the issue" by their pleadings. By the mode of procedure in Courts of Equity, the issues were not eliminated by the bill and answer, as the testimony was all in writing, in exhibits and depositions. The Chancellor could take his own time, if the cause was heard upon bill, answer, exhibits and depositions, and the argument of counsel, and settle for himself "the issues" upon which the case turned.

C. C. P. adopts the mode of procedure in Courts of Equity, by complaint and answer, and "the issues" are not "eliminated by the proceedings." This in complicated actions gives rise to much inconvenience, because the trial is by jury
(325) upon the *viva voce* test, instead of depositions, which could be perused at leisure; hence very frequently, after the jury is empanelled, and the witnesses are examined, much delay is caused by the discussion and "wrangling" of counsel as to "the issues," which the Judge should submit to the jury, and His Honor is obliged "off hand," to decide upon which issues the case should turn. The consumption of time during the term, in the discussion about "the issues," results in serious damage to suitors of the Court, and upon appeal after verdict and judgment, in many cases, this Court has been compelled to order a *venire de novo*, because some material matter had not been submitted to the jury. Rules III, IV and V, were adopted at June Term, 1871, as a remedy for this evil, by allowing the counsel at the appearance term, if they could agree, otherwise the Judge to settle "the issues," so that when the case was called for trial, there should be no delay, and all that was to be done was to examine the wit-

nesses and take the verdict, after proper instructions from the Court.

It was not intended by these rules to make an entire change in the mode of jury trials heretofore in use, so as to require in every case a special verdict, setting out the *dry facts*, leaving the law to be afterwards declared by the Judge, or to require a special finding of particular questions as dry facts, the legal effect to be afterwards decided by the Judge. C. C. P., section 232 and 223.

Most of "the issues," or questions upon which a case turns, are compounded of both law and fact, with instructions in regard to the law. The only purpose of the rules was to have these issues or questions settled beforehand, to avoid delay and surprise at the trial. Does the deed under which the defendant claims as color of title cover the land in dispute? *Osborn* v. *Johnson*, at this Term. This involves both law and fact. It was for the Judge to instruct the jury what are the boundaries, and for the jury to find whether these boundaries cover the land. Did the defendant have (326) a good title to the land? *McKesson* v. *Hennessee*, at this Term. It was for the Judge to say what facts the jury must find to entitle the defendants to their verdict. From these two examples, the questions or issues presented in a case, can be easily settled according to the rules.

Another instance, indictment for murder, plea, "Not guilty." "The issue" is a compound of law and fact. The Judge must instruct the jury, if they are satisfied that the prisoner killed the deceased, what facts are necessary to constitute murder. So the jury are to decide on the instructions and the evidence, the issues "guilty" or "not guilty."

We presume the Judge would not be precluded from presenting other issues in his charge, should it appear by the investigation, that some other matter ought to be passed upon by the jury for the purpose of a decision on the merits, subject, of course, to his power to allow a continuance to avoid surprise.

Thus it is seen, that the only alternative in practice which was intended to be made by these rules, was to have the issues made up *beforehand*, after due reflection upon the complaint and answer, instead of having it done *after the trial was entered upon*. So the idea of an appeal from this mere preliminary proceeding, is out of the question. Suppose, before the adoption of these rules of practice, the Jude had,

on the trial, refused to submit a certain matter to the jury? Could the trial stop, so as to allow an appeal? It might as well be contended that when evidence is ruled out, the trial should stop, until the opinion of the Supreme Court could be had in regard to it, by an appeal. The rule would be rescinded at once, if it had the effect of giving occasion for delay by appeal, where the counsel of the parties shall differ in opinion with His Honor.

Appeal dismissed.

PER CURIAM. Judgment affirmed.

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(327) MARY LAXTON *v.* EDWARD TILLY, Adm'r, *et al.*

Where a deed was made by a father to his son, in pursuance of a previous agreement, and contained the following clause, to wit: "For, and in consideration of $200, and the faithful maintenance of T. L. and wife, P. L., hath given and granted unto the said T. L., a certain tract of land, to have and to hold," etc.: *Held*, that this stipulation constitutes a charge upon the land, in the hands of the heir at law, though not upon the personal estate in the hands of the administrator.

This was a civil action, tried at the Fall Term, 1871, of Caldwell Superior Court, before Mitchell, Judge,

The suit was brought by Mary Laxton, who alleged in her complaint, that she was the widow of Thomas Laxton, deceased; that said Thomas Laxton was seized at one time of several tracts of land, which he gave by way of advancement to his three sons, charging the land given to Levi, one of his sons, who has since died, with the maintenance of the said Thomas and the plaintiff during their lives. A copy of the deed to Levi is set forth. The clause in said deed, which is relied upon to establish the charge of maintenance, etc., is as follows: "Witnesseth, that for, and in consideration of the sum of two hundred dollars, and the faithful maintenance of the said Thomas Laxton and wife Polly Laxton, hath given, granted, etc., unto the said Levi Laxton, a certain piece or parcel of land," etc. That the said Levi promised and agreed, at the time of the execution of said deed, faithfully to maintain the plaintiff and her husband during both their lives as part of the consideration for said conveyance, etc.

That said Levi did perform this undertaking during his lifetime. That since his death the defendants, his personal representative, his widow and her heir at law, have failed and refused to support and maintain the plaintiff.

Plaintiff demands judgment, that a trust be declared in her favor, in consequence of the provision in the deed,
(328) and that the defendants, the widow and heir at law of Levi Laxton be declared trustees, etc.

That an account be taken to ascertain a reasonable amount for maintenance, and that the personal representative be required to pay the same in exoneration of the real estate.

Defendants admit in their answer the execution of the deed and that a correct copy is set forth, but they deny that the land conveyed to Levi Laxton was subjected to any charge for the maintenance of the said Thomas and the plaintiff. They deny any promise to support and maintain the plaintiff and the said Thomas at the time of the execution of the deed, and insist that the complaint is multifarious, &c. They deny also that they have refused to support the plaintiff.

The case was referred to the Clerk, to report the facts touching the contract between Thomas Laxton and Levi, his son.

What would be a reasonable support, &c., for the plaintiff? Have the personal representative, and heir at law, and next of kin refused to support? &c.

The Clerk took testimony and reported to the Court. The report was confirmed by His Honor.

Upon motion, a decree was made by His Honor in substance that "the Court is of opinion, that by the deed of Thomas Laxton to his son Levi, the land described in said deed is subject to a charge for the maintenance of said Thomas and wife during their lives.

"It is therefore adjudged that a lien is hereby declared upon said land for the support of the plaintiff; and it further appearing that the defendant Tilly, administrator has assets to the amount of one hundred and seventy-six dollars, in exoneration of the real estate, it is ordered, that the administrator, so long as he has assets, pay to the plaintiff the sum of $40 *per annum*, and that in default of assets, the sum is declared a charge upon the land to be discharged upon payment of $40 *per annum*."

Defendants made several objections to the rulings of His Honor:

1st. That the bill was multifarious.

(329) 2nd. That the action could not be maintained in the name of plaintiff.

3d. That the deed did not constitute any charge on the real estate.

4th. That there was no evidence of a promise, and that the Court could take no notice of the report of the Clerk.

The case was heard upon the complaint, answer and report of the Clerk, and His Honor having overruled all objections made by the defendants and entered the judgment above stated, they appealed.

Ovide Dupre, for plaintiff.
Folk, for defendant.

READE, J. The maintenance of the plaintiff is not a charge upon the personalty of the estate of Levi Laxton, dec'd, in the hands of the defendant his administrator, but it is a charge upon the land which Thomas Laxton sold to Levi Laxton, with the stipulation that Levi should support the plaintiff.

The judgment below will be modified in conformity with this opinion, and the cause will be remanded, and this will be certified.

PER CURIAM. Judgment modified.

(330) A. R. HOMESLY *vs.* ELIAS and COHEN.

Where there are two places upon a railroad for the reception of freight, one called the depot proper, the other a platform a half-mile distant from the *depot proper*, where heavy and bulky articles were received and deposited for shipment; and there was evidence tending to show that a quantity of cotton, (the subject-matter in controversy) had been delivered at the *platform; Held*, that under the circumstances of this case defendants had a right to ask a witness the question, "Where was the customary place to deliver cotton to the W. C. and R. R. R., in Charlotte?" and also the question. "where was the Railrord depository of cotton;" and that it was erroneous in the Court to exclude such testimony.

This was a civil action tried before Logan, Judge, at Fall Term, 1871, of Gaston Superior Court.

Plaintiff declared upon a written agreement made between the parties, and dated January 25th, 1865. The agreement is in substance as follows: "The parties of the first part, (defendants in this action,) stipulate and agree with the parties of the second part (plaintiff in the action) to sell to him 200 bales of cotton, of middling quality, &c., to be delivered at the depot of the Wilmington, Charlotte and Rutherford Railroad Company in the city of Charlotte."

In consideration of this undertaking plaintiff agreed to pay for the cotton at the rate of $1.50 per pound in cotton yarn, at forty-five dollars per bunch to be delivered at Cherryville, &c. The testimony in the case is voluminous.

The testimony deemed material to the decision of the case, the exceptions to the evidence and the charge of the presiding Judge are clearly set forth in the opinion of the Court.

There was a verdict for the plaintiff. Rule for a new trial. Rule discharged. Appeal prayed and granted.

Bynum, Schenck and *Bailey*, for plaintiff.
Hoke, Wilson and *Vance & Dowd*, for defendant.

(331) BOYDEN, J. This was a civil action, founded upon a written contract which is made a part of the case, by which the defendant had undertaken to deliver for the plaintiff at the depot of the W., C. & R. R. R., in Charlotte two hundred bales of cotton. It appeared in evidence that there were two places for the reception of freight; one which may be called the depot proper, where the buildings were, and where the station agent usually transacted his business; the other, a place for the reception of freight, was about a half mile distant, at the point where the W., C. & R. R. R. crosses the railroad leading from Charlotte to Statesville, where platforms had been erected for the reception of cotton, iron and other heavy and bulky articles, and was called the cotton platforms; and it was at this place that the railroad usually received these heavy and bulky articles for transportation, and there was evidence tending to show that the defendants had delivered the plaintiff's cotton at this crossing.

The plaintiff took the position that a delivery of the cotton at the platform at the crossings, would not constitute a delivery in the meaning of their contract; but that the cotton should have been delivered at the depot proper.

The defendants called as a witness Allen Cruse, who testified that he was the only licensed drayman in Charlotte in 1865, and that he hauled most of the cotton of Elias & Cohen for the plaintiff. This witness was asked by defendants "where was the customary place to deliver cotton to the W., C. & R. R. R. in Charlotte." This evidence was objected to by the plaintiff, and rejected by the Court. Defendants then asked the witness where was the railroad depository for cotton? Plaintiff objected to this evidence, and His Honor sus-

tained the objection. The Court then stated to the counsel of defendants, that they might ask where the depot is, and where the cotton platforms were.

The witness then stated that the cotton was delivered at the platform at the crossing, by direction of Harly the agent at the depot.

(332) His Honor, in charging the jury in relation to the depot, said, "A depot is a place to receive and forward freight, entrusted for safe keeping. There are more than one depot on railroads. The question is at which depot was the cotton to be delivered: which is the depot meant, is a question of fact for the jury."

We think His Honor erred in rejecting the evidence as to where was the customary place to deliver cotton to the W., C. & R. R. R. in Charlotte, and where was the railroad depository for cotton.

This could have been evidence in any view of the case, as it touched the very point in issue; but more especially was it evidence as His Honor stated to the jury that this was a question of fact for them. After this charge of His Honor, upon what principle could it be insisted that this evidence was inadmissible?

As His Honor was in error in rejecting the evidence offered, and as the decision of this question disposes of the case in this Court, we deem it unnecessary to notice any of the other points made by the defendant.

The authorities cited to sustain His Honor in the rejection of the evidence, have no application.

There is error. This will be certified.

PER CURIAM. *Venire de novo.*

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(333) WM. FRONEBURGER *v.* H. D. LEE, Ex'r, *et al.*

1. Under our old system of practice and procedure, a Justice of the Peace had a right to grant a new trial when judgment was rendered against an absent party, if a proper application was made within ten days. Rev. Code, chap. 62, sec. 15. The provisions of that Statute have not been materially changed under the new system. C. C. P., sec. 508.

2. When both parties to an action are present at the trial in a Justice's Court, and the case is heard, and judgment rendered, a new trial cannot be allowed. The party dissatisfied must appeal to the Superior Court. C. C. P., sec. 528.

Motion to dismiss an appeal heard before Logan, Judge, at Fall Term, 1861, of Cleveland Superior Court.

The plaintiff sued the defendants upon an account and they were cited to appear before a Justice of the Peace. Both parties appeared on the day of a trial, witnesses were examined, and the case was heard by the Justice, and a judgment rendered in favor of the defendants. Several days after the trial, the plaintiff filed an affidavit and asked for a new trial before the Justice. A new trial was granted, and from this order of the Justice the defendants appealed to the Superior Court. In the Superior Court, plaintiff moved to dismiss the appeal. The motion was allowed, and the appeal dismissed from which judgment the defendants appealed to the Supreme Court.

Bragg & Strong, *Young* and *Batchelor*, for plaintiff.
Bynum, for defendants.

DICK, J. Under our old system of practice and procedure, a Justice of the Peace had a right to grant a new trial when rendered against an absent party, if a proper application was made in ten days afterwards. Rev. Code, c. 62, s. 15.
(334) The provisions of this Statute have not been materially changed under our new system. C. C. P., s. 503.

When both parties to an action are present at a trial in a Justice's Court, and the case is heard and judgment rendered, a new trial cannot be allowed. The party dissatisfied with the judgment can have a remedy only by appeal to the Superior Court. C. C. P., sec. 528.

There was error in the ruling of His Honor. This will be certified to the end that the proper proceedings may be had to set aside the order for a new trial made by the Justice.

PER CURIAM. Judgment affirmed.

SUSAN MEBANE, Guardian to use of C. S. HARRIS and his wife, E. S. HARRIS *v.* C. P. MEBANE *et al.*

1. Where a note was given, and made payable to A as guardian, and it was afterwards, in settlement, delivered to the husband of the ward without endorsement; *Held*, that a suit upon said note was properly brought in the name of the guardian to use of the husband and his wife.

2. A trustee may sue in his own name, or he may join his *cestui que trust;* and the trust between guardian and ward, may be kept alive

after a settlement, if they so choose, without any purpose. *Rankin* v. *Allison*, 64 N. C., 673; *Biggs* v. *Williams*, at this Term.

This was a civil action tried before Logan, Judge, at Fall Term, 1871, of Cabarrus Court.

The plaintiff declared upon a promissory note given by the defendants and made payable to "Susan Mebane, guardian of E. S. Mebane." The said note was delivered to the said E. S. Mebane and her husband, upon their marriage, in settlement of the guardian account and without endorsement.

Suit was brought in the name of the guardian, to the use of the owners of said note—the husband and wife.

Defendants demurred upon the ground that the suit
(335) should have been brought in the name of the parties really interested, and that the guardian was improperly joined.

The Court overruled the demurrer and gave judgment, from which defendants appealed.

J. H. Wilson, for plaintiffs.
Vance & Dowd, for defendants.

RODMAN, J. This action is brought on a note made by the defendants, payable to the plaintiff, "Susan Mebane, guardian of E. S. Mebane." The infant afterwards married Harris, and the guardian delivered the note to the husband and his wife as a part of her estate, but never transferred the legal title by endorsement. The defendants demur on the ground that the action should have been brought in the name of Harris and his wife as plaintiffs, instead of in the name of the guardian.

The C. C. P., sec. 55, says: "Every action must be prosecuted in the name of the real party in interest except as otherwise provided in sec. 57."

Sec. 57 says: "A trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is presented." And, "a trustee of an express trust within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." Certainly a guardian who takes a note payable to himself and describing himself as guardian, is trustee of an express trust within the very words of this section.

He may sue alone without naming a *cestui que trust*, or he

may join them with him as was done here. The defendants cannot be injured by this, because if the *cestuis que trust* are made parties, as such, as they are here, he may plead any defense which would be good against them; and if they be not, he can, by an answer averring their equitable interests, set up such defense, and the Court may require them
(336) to be made parties. *Rankin* v. *Allison*, 64 N. C., 673; *Biggs* v. *Williams*, decided at this Term.

But it is said that here the trust had ceased by the delivery of the note to the ward as her property upon a full settlement of the guardian with her. We do not think that this altered the matter. If the guardian had endorsed the note to the ward, that would have ended the trust; but there was nothing unlawful in keeping the trust alive; the parties might do so if they chose, for any or without any purpose, and that the legal estate was not transferred by an endorsement, shows that they did choose to keep it in the trustee.

The judgment below is affirmed.

PER CURIAM. Judgment affirmed.

F. G. SIMMONS *et al. v.* THOMAS G. WILSON *et al.*, Commissioners of Jones.

The Commissioners of a County have no right to exceed the double of the State tax, except:

1. To pay debts of the County, legally contracted before the adoption of the Constitution.
2. When the tax is for a special purpose, and has been allowed by an Act of the General Assembly.*

This was a motion to vacate a restraining order, heard before Clarke, Judge, at Chambers.

The complaint alleges that the defendants, the Commissioners of Jones county, had levied 75 cents on the $100 valuation of real estate in said county for school purposes.
(337) The same not having been submitted to a vote of the people, nor to a vote of any township, and without authority of any school committee.

That they had levied a tax to pay old debts, of 49 cents on the $100 valuation; that they had levied a tax of 29 cents for current expenses, etc.; all the taxes together amounting

*NOTE.—The Act authorizing the Commissioners of Jones to levy a tax was repealed March 4th, 1871.

to $2.30½ on the $100 valuation of property, real and personal; that the State taxes, for all purposes, did not exceed 37 1-6 cents on the $100 valuation aforesaid; that said taxes are in violation of the Constitution and laws of the land.

Complaint asks judgment for an injunction, etc.

His Honor, Judge Thomas, made an order requiring the defendants to show cause why an injunction should not be issued, and in the meantime granted a restraining order. The defendants answered the complaint. They admitted a levy of 75 cents for school purposes, and alleged that it was necessary for that purpose; that a tax of 49 cents on the $100 valuation of real and personal property was levied to pay debts and necessary expenses; that a tax of 77 cents was levied to build bridges and for the support of the poor, and that amount was necessary for that purpose; and they were authorized to levy the same by an act of the General Assembly, ratified March 1st, 1870; that a tax of 29 cents on the $100 valuation was levied to pay necessary expenses for the ensuing year.

On motion, before Clarke, Judge, the restraining order, granted by Judge Thomas, was vacated and plaintiff appealed.

Manly & Haughton, for plaintiffs.
Lehman and *Green*, for defendants.

RODMAN, J. We think the Commissioners had no right to exceed the double of the State tax, except:

1. To pay debts of the county legally contracted prior to the adoption of the present State Constitution. There do not appear to be any of these.

(338) 2. When the tax is for a special purpose and has been allowed by an act of the Legislature. Some of the taxes here were levied under an act which has since been repealed. If the tax was not collected before the repeal, it cannot be collected afterwards.

The judgment below should have continued the injunction as to the excess of the tax over the double of the State tax. The case is remanded to be proceeded in according to law.

Let the opinion be certified. Each party will pay his own costs.

PER CURIAM. Judgment reversed.

T. W. TAYLOR *v.* HENDERSON ADAMS, Auditor.

The State is bound, under the Act of 1869-'70, to pay the expenses of conveying convicts to the penitentiary. The Act of 1870–'71, chapter 124, does not repeal the former act in this respect.

This was a petition for a mandamus, heard before Watts, Judge, at Special Term of Wake Superior Court, January, 1872.

The plaintiff was the Sheriff of the County of Henderson. He stated in his petition that one Charles Hutchison was tried and convicted at the last Term of Henderson Superior Court of larceny, and sentenced to be confined in the penitentiary for three years. That according to the judgment of the court he brought the said convict to the penitentiary and delivered him to the officers in charge of that institution. That he incurred expenses, amounting to $100, or more, for conveying said convict to the penitentiary, and that the State was bound to pay the same; that he had presented his claim to the Auditor, and he had refused to audit the same.

The petition further stated, that the sum claimed had
(339) been allowed by the County Commissioners of Henderson county.

He prayed for a mandamus against the Auditor.

Upon the hearing the petition, His Honor ordered the writ to be issued as prayed for. From which order the defendant appealed.

Phillips & Merrimon, for plaintiff.
Attorney-General, for the defendant.

BOYDEN, J. The Act of 1869–'70, provided that the expense of keeping, maintaining, conveying and guarding convicts sentenced to confinement in the penitentiary should be defrayed by the State Treasury, from the time of the sentence of such convict. The Act of 1870–'71, ch. 124, sec. 3, declares, "That the State shall not be held liable for the expense of maintaining convicts, until they shall have been received at the penitentiary, nor shall any moneys be paid out of the Treasury for support of convicts prior to such reception." From the wording of these two statutes, we think it is manifest that the Legislature did not intend to repeal that part of the act of 1869–'70, which enacted that the expense of *conveying* convicts to the penitentiary should be defrayed by the State Treasury, as it would be very un-

just, that the expense, which must be so unequal and so heavy for the distant counties and so light for Wake and the neighboring counties, and such as are contiguous to the railroads, that the language of the two acts shows that the Act of 1870–'71, only intended to provide that thereafter the expense of maintaining convicts should no longer be borne by the State, until their reception at the penitentiary, leaving the other expenses, to be defrayed as provided in the act of 1869–'70.

In deciding the question of law as above, it may be proper to remark, that this Court does not claim the right to command the Auditor to decide otherwise than according
(340) to his own judgment in the matter, but only that the plaintiff is entitled to have his claim audited and allowed, or rejected according to the judgment of the Auditor.

PER CURIAM. Judgment affirmed.

A. J. LOFTIS *v.* NANCY RAXTER.

1. Where a party has a witness summoned in his behalf, and the said witness is in attendance upon the Court, but is neither sworn, tendered, nor examined: *Held*, that according to the practice in this State, the attendance of said witness should be taxed against the party by whom he was summoned.

2. Where a material witness has been summoned and is not present at the trial but has theretofore been in attendance, and the question is made in apt time, the party summoning the witness, has the right to tax the attendance of such witness against his adversary only in case of satisfactory proof of the materiality of the witness, and that his absence was on account of sickness or other sufficient cause.

Costin v. *Baxter*, 7 Ire., 111; *Wooley* v. *Robinson*, 7 Jones, 30: *Venable* v. *Martin*, 1 N. C. L. Rep., 515, cited and approved.

This was a motion for retaxation of costs, heard before Cannon, Judge, at Fall Term, 1870, of Transylvania Superior Court.

An action of ejectment was tried between the parties at Spring Term, 1869. Before the jury was empaneled, each party called their witnesses. None were sworn or tendered by the defendant in the action. A verdict was rendered for the defendant. The plaintiff moved that the attendance of the defendant's witnesses should be taxed against her. The Court ordered a rule to show cause against the defendant. This rule was continued till Fall Term, 1870, when the Court

ordered that the defendant pay the attendance of her witnesses at the trial term, and that plaintiff pay the costs for their attendance at the previous terms of the Court
(341) and while the case was pending. From this order the plaintiff appealed to the Supreme Court.

Phillips & Merrimon and *D. Coleman*, for plaintiff.
Ovide Dupree, for defendant.

BOYDEN, J. In this case, before the parties had announced themselves ready for trial, they called their witnesses and they answered the call. The parties declared that they were ready for trial, and the jury was empaneled and the trial proceeded, and a verdict was rendered in favor of the defendant. There were a number of the defendant's witnesses in attendance that were neither qualified nor tendered, and after the verdict, the plaintiff moved for a rule to show cause why the defendant's witnesses, that were neither sworn nor tendered, should not be taxed against him. His Honor made the following order:

"That the defendant show cause why the taxation of costs, should not be ordered and made as moved for." The motion and rule were continued by consent. The Court ordering the taxation of witnesses to be deferred and to await the final decision.

At Fall Term, 1870, the Court ordered that "the defendant pay the costs of said witnesses at the trial term, and that the plaintiff pay all the costs for their previous attendance." From this order, taxing him with a part of these witnesses, the plaintiff appealed to this Court.

This motion to tax the defendant with the costs of his witnesses, who had neither been qualified nor tendered, was made in apt time. The question made is whether a party whose witnesses are in attendance, is entitled to have such witnesses who are neither qualified nor tendered before the verdict, taxed against his adversary.

We think the practice in this regard is well settled, that in cases where a verdict is rendered the party is only entitled to have such witnesses taxed who are either sworn or
(342) tendered. *Coston* v. *Baxter*, 7 Jones, 111; *Wooley* v. *Robinson*, same, 30; and *Venable* v. *Wheeler*, 1 N. C. L. Reps., 515. When a material who is not present at the trial, but who has theretofore been in attendance when the

question is made in apt time, a party is only entitled to have such witness taxed against his adversary upon satisfactory proof of the materiality of his evidence, and that his absence was on account of sickness or other sufficient cause; for if the witness failed to attend without sufficient excuse, he is not entitled to have his attendance taxed against either party, but is liable to a penalty of forty dollars, and to such damages as the party may have sustained by reason of his wilful default.

When the question is as to the number of the witnesses to be taxed, on account of conflict of evidence, that is matter of discretion for the Judge who tries the cause, and no appeal lies in such a case.

There is error. This will be certified.

PER CURIAM. Judgment reversed.

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(343) JAMES L. BATTLE *vs.* W. & W. RAILROAD.

1. It is enacted by the Act of 1856–'57, ch. 7, "that when and cattle or other live stock shall be killed or injured by the engine or cars running upon any railroad, it shall be *prima facie* evidence of negligence;" this rule can only be rebutted by showing that the agents of such railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence.

2. Independent of the legal presumption, where railroad cars were left on an inclined plane, where they could be easily set in motion, and were very insecurely fastened; and one of the animals, for the killing of which this suit was brought, was killed a month previous to the other, by a car which had escaped and run down the same grade, and the agents of the defendant being thus apprised of the danger of such action, did not use proper precautions to prevent future injury, *Held*, to be gross negligence, for which the company was responsible.

Clark v. *W. N. C. R. R.*, 1 Winst., 109, cited and approved.

This was an action brought by plaintiff against the defendant to receive damages for killing a mule and calf. Tried before Moore, Judge, at Fall Term of Edgecombe Superior Court.

It was in evidence that the railroad of the defendant ran through the enclosed pasture lands of the plaintiff, that there was a continuous grade on the land from and through the pasture to the depot, about a half mile distant. That two empty cars were coupled together, and left standing on the grade or inclination all night, the upper car being *chocked* with a stick of wood. On the next day the lower car was found to have run down the grade and killed the mule of the plaintiff, the upper car still standing and chocked. The calf

had been killed a month previous by a car left on the grade, but there was no evidence as to how the car was left.

A witness testified that a man could kick out the chock, and with his hand start a car to running, and being
(344) started, it would run of its own motion with accelerated velocity over the grade for more than a half mile.

Another witness testified, without objection, that he had been long employed on railroads, and according to the usage of building roads he considered it a proper and suitable grade. This grade was on the main track, and it was in evidence that the Company generally left their empty cars standing on the grade and not on any turnout.

Witness testified that *turn-outs* could be constructed where empty cars could securely rest without *chocking* or coupling, but at considerable cost.

The Court charged the jury, that if the car was so left on the main track and grade, that one man could uncouple it and by his single arm could and did start it running down the grade whereby the mule and calf were killed, it was negligence.

Verdict for plaintiff. Rule for *venire de novo*. Rule discharged. Judgment for plaintiff. Appeal by defendant.

John L. Bridgers & Son, for defendant.
No Counsel, for plaintiff.

DICK, J. The railroad track of the defendant passes through the pasture lands of the plaintiff for a half mile with a descending grade. The mule and calf belonging to the plaintiff were killed by cars which in some way were set in motion and run down the grade.

By presumption of law (Act 1857, ch. 7) the defendant was guilty of negligence, and this presumption could only be rebutted by showing that the agents of the defendant had used all proper precaution to guard against the damage. It was sufficient to prove that there was probably no negligence. *Clark* v. *W. N. C. R. R. Co.*, 1 Winston, 109.

Independant of the legal presumption, the evidence in this case shows gross negligence on the part of the agents of the defendant.

The cars were left on an inclined plane where they
(345) could be easily set in motion—and they were very insecurely fastened. The calf was killed a month be-

fore the mule, by a car which had escaped from the fastening and run down the grade; and the agents of the defendant were thus apprised of the danger of such accidents, and they did not use proper precaution to prevent future injury.

There was no error in the charge of His Honor and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

W. A. HAGLAR & WIFE and others *vs.* R. D. MCCOMBS,

1. When a father is indebted to his children, and gives them property or money at their maturity or marriage, the presumption is that this is a payment of the debt, and not an advancement. This presumption is, however, liable to be rebutted by the facts of the case.
2. If money is given to a son-in-law under similar circumstances, or paid by the father-in-law as surety, the same rule applies.
3. If a father, while acting as executor, receives into his possession a number of slaves bequeathed to his children, and afterwards sells one of them, and retains and controls the others until their emancipation; *Held*, that in an action for an account for the hire of said slaves, &c., it shall be determined, as a fact, whether he converted or intended to convert the slaves to his own use, or whether he held them as trustee or bailee for his children. If the former, a debt is established, and the presumption above referred to applies—otherwise it does not.
4. A trustee is generally entitled to commissions, but when a person is trustee by reason of his being executor, and voluntarily assumes control of a fund willed to minor children, he not being their guardian, he is not entitled to commissions.
5. A father is bound to support his children if he has ability to do so, whether they have property or not, and he is not entitled to any credit for such support in a settlement of accounts between them and himself.
6. In an action for an account, against an executor, the personal
(346) reresentative, and not the children, of a deceased legatee, should be made a party.

Taylor v. *Lanier*, 3 Mur. 98. *Walker* v. *Crowder*, 2 Ired Eq., 478, cited and approved.

N. B. The transcript sent to this Court does not show before whom this case was tried, but inasmuch as it was filed dering the term, and Judge Cloud presided at the last term of Cherokee Court, it is presumed that it was tried by him.

This was an action tried before Cloud, Judge, at Fall Term, 1871, of Cherokee Superior Court.

This action was brought by the plaintiffs against the defendant, seeking to charge the estate of the intestate, Abram Sudderth with the value of certain slaves and the hire of other slaves, which they allege were willed to them by their grandfather, John Hennessee. They claim the slaves and

other property under two clauses of the will of said Hennessee, which are set out in the opinion of the Court. The plaintiffs, Sarah, wife of Haglar, Margaret, wife of Howell, Ailsey, wife of Hyde, Judy, wife of Dean, are the grandchildren of Hennessee and the children or Abram Sudderth by a former marriage, and the plaintiffs Wallis, Victoria, Abram and Jacob Williams, who sue by guardian, are the children of one Excey Williams, deceased, who was likewise a granddaughter of said Hennessee and a child of Abram Sudderth.

The defendants are the administrators of Abram Sudderth, deceased, his widow, who was his second wife, and a daughter of the second marriage, and her husband.

In the progress of the trial, the case was referred to auditors for an account. They made a report to Fall Term, 1870.

Various exceptions were filed to the report by both plaintiffs and defendants. His Honor sustained the exceptions made by the plaintiffs, and overruled the defendants.

Plaintiffs moved for judgment according to the report modified by their exceptions. His Honor refused to give judgment, and each party appealed to the Supreme Court.

(347) The exceptions to the report, and all other facts material to the case, are fully stated in the opinion of the Court.

Erwin and *Folk*, for plaintiffs.
Phillips & Merrimon and *Dupre*, for defendant.

RODMAN, J. *Plaintiff's case:* John Hennessee died in 1843, leaving a will, by which he bequeathed among other things, as follows:

"Item 4. I give Abram Sudderth's children, my grandchildren, the one-half of my negroes, remaining after the above bequests are taken out, and also the boy my wife has during her lifetime."

He likewise, by item 6, gave his said grandchildren a share in the residue of his estate. Abram Sudderth and Patrick Hennessee were appointed executors.

The plaintiffs, Sarah, wife of Hagler, Margaret, wife of Howell, Ailsey, wife of Hyde, and Judy, wife of Dean, are the grandchildren referred to in the will, the other plaintiffs are children of Excey, one of the grandchildren of the testator who died after him.

The complaint states that Abram Sudderth, under the above bequests to his children, received several slaves, one

of which he sold for $1,000, which he invested in part payment for a piece of land purchased, in his own name, for about $7,000. It also makes Lycurgus Howell and his wife Adlee, who is a daughter of Abram Sudderth, by his second marriage, parties defendant. The administrators of Abram Sudderth are also defendants, but no account of his estate is asked for. The plaintiffs seek to charge his estate with the value of the negroes which he received from the estate of their grandfather and sold, and with the hire of the other negroes which he kept in his possession until their emancipation.

Defence:

1. The principal defence is that Abram Sudderth, during his life time, delivered to the *femes* plaintiffs, at or after their marriages, negroes or other property, the value of
(348) which should be deducted from the debts claimed by the plaintiffs.

2. That as the claims of the plaintiffs are several, they cannot sue jointly.

3. The administrators of Abram Sudderth say they have no assets.

4 Lycurgus Howell and wife say they ought not to be parties, as they have no interest in the controversy. By consent it was referred to auditors to state an account of the property received by Abram Sudderth under the bequests of the will of Hennessee, and of the property and money given by him to his children during his life.

An account was accordingly taken, by which it was found that Abram Sudderth had received property of his children amounting, according to the mode of taking the account, adopted by the auditors, $6,580.82, and that he had given to the children as aforesaid, different sums, to some less, and to others more, than their proportionate shares of the above.

Both parties excepted.

Before proceeding to the exceptions, however, it will be well to notice some points which are independent of the main questions, and of the mode of taking the accounts.

1. Upon the showing of the plaintiffs, the children of Excey are not proper parties. They can assert no claim to her property in action, except through her personal representative. The complaint should be amended in that res-

pect by making her administrator a party, in lieu of her children.

2. It is clear that no recovery can be had against the administrators of Abram Sudderth in the face of their denial of assets, without an account being taken of their administration.

3. Such an account being necessary, Lycurgus Howell and his wife, and also the widow of Abram Sudderth, are proper parties, because they are interested on the account.

4. Although the plaintiffs, if they recover at all, will each have a separate judgment in his favor, yet they are (349) tenants of a common fund, and the judgments to be given will affect them all. They are all, therefore, properly made plaintiffs.

Having thus cleared the case of these minor questions, I return to the exceptions.

The plaintiff's exceptions may be reduced to two:

Exception 1. That the property and money given to them by their father in his life-time, was given by way of advancement, and cannot properly be set off in abatement of their present claims which are debts

Answer. That would be true, if it appeared that the supposed gifts had been professedly made as gifts or advancements. A debtor may undoubtedly make a gift to his creditor, and leave the debt unpaid. In the case of a delivery of money or property by a debtor to a creditor, without consideration at the time, they being strangers, the presumption would be very strong that such transfer was not a gift, but a sale or payment. And although undoubtedly in the case of a transfer under such circumstances by a parent to a child, the presumption would be more easily rebutted, yet we think upon the naked facts, the presumption must be against its being a gift. In the present case, it is a question to be determined upon the circumstances, whether the property and money put in possession of the plaintiffs, or paid to or for them, was intended by the father as a payment of a debt which he owed them, or as a gift which still left the debt unpaid. There is no direct finding upon this question, nor any direct evidence upon it. In fact, the question itself is not anywhere distinctly stated. It seems to be assumed that the supposed gifts were intended as advancements. In the absence of all direct evidence, and of circumstances other than those stated, we think

the presumption would be that the father intended to pay his children what he owed them, rather than to make gifts to them, leaving the debts unextinguished and subsisting. Just as if a father has agreed to give a portion to a daughter during his life, which is left unpaid at his death, a legacy
(350) to her in his will, is generally presumed to be in payment of the portion; though the presumption is liable to be rebutted by proof of circumstances indicating a contrary intention. 2 Story Eq. Jur., secs. 1108 and 1109; *Taylor* v. *Lanier*, 3 Mur., 98. This exception is therefore overruled.

Exception 2. That the sums paid to or for the husbands of Mrs. Dean and Mrs. Williams, ought not to be allowed as against them, because they were paid by Abram Sudderth on notes to which he had become surety for their respective husbands.

Answer. It can scarcely be contended that a gift of property to a son-in-law, would not be *prima facie* an advancement to the wife; and this being so, no reason is seen why the payment of the husband's debts would not be equally an advancement; and no reason is seen why the father's having become surety for those debts should make the payment the less an advancement. The same reasoning would seem to apply to a case where the father was a debtor to the daughter before her marriage. The husband was entitled to receive payment, and the question is at last as to the intention of the parties, as to whether it was in fact a payment or a gift. This exception is therefore overruled.

The defendant's exceptions are very numerous. I will endeavor to abbreviate what is to be said upon them by grouping several of the same sort together.

Exception 1. That no credit was allowed the father for the necessary expenses of the negroes received by him, while in his possession.

Answer. The auditor charged the intestate with the sum for which he sold one of the negroes with interest from the sale. Clearly this was right and it is not accepted to. They then charged him with the annual value of the services of the other negroes up to their emancipation. We must assume that this was, as it ought to have been, the net value, after an estimate of the usual attendant expenses. As to
(351) whether it was a correct valuation in fact or not, we are not called on to say. No question of that sort ap-

pears to have been distinctly presented to the Judge below, or to have been found by him.

This exception is overruled.

But we do not wish to be understood as saying that this account is taken on a correct principle. I shall remark on that after disposing of the exceptions.

2. *Exception.* That the father was not credited with the support of his children (during their minority, as we understood it).

Answer. A father is bound to support his children during minority if he be of ability to do so, whether they have property or not, and he is entitled to their earnings. If the father be indigent, and the children have property, the proper Court may apply a portion of their income to his assistance; without such order he cannot touch it. *Walker* v. *Crowder*, 2 Ire. Eq., 478.

This exception is overruled.

3 *Exception.* That the intestate was not allowed any commissions for managing the property of the plaintiffs.

Answer. A trustee is generally entitled to commissions. But here the intestate was only a trustee by reason of his being one of the executors of Hennessee. He was not the guardian of his children so as to entitle himself to the care of their property. He voluntarily assumed it, no doubt, from motives of affection, and therefore at least excusable. He kept no accounts. He never accounted for the fund, or paid it over in specie, though he may have paid other property of equal or greater value. He never charged and probably never desired commissions. We think he is not entitled to any.

This exception is overruled.

4 *Exception.* That Nelson A. Powell is not a party.

Answer. I have not seen on the pleadings how Powell is interested. If he ought to be a party, the pleadings can be amended to make him so; and if this be not done, the defendants can have the benefit of the point hereafter.

(352) Having thus disposed of the exceptions, as it was necessary to do, it will be seen that none of them go distinctly to the merits of the case. It is necessary, therefore, to go on and indicate what we conceive to be the questions really arising on the facts pleaded, and which must be decided in order to settle the controversy between the parties upon its merits.

The first question is, did Sudderth convert to his own use, or intend so to convert, the negroes received by him for his children, or did he continue to hold them as the property of his children up to their emancipation? We say, did he convert or *intend* to convert; because although it was not in the power of Sudderth the father, by any act or intention of his not assented to or acquiesced in by the plaintiffs, to transfer their property in the negroes to himself, or to prevent their following in the hands of third persons, yet, if he showed by his manner of dealing with the negroes that he regarded them as his own, and upon that footing made payments to the plaintiffs which they received, it would be evidence of their assent to the conversion, which, in the absence of fraud or some other equitable element of like force, would bind them, so that they could not afterwards deny it. And upon this question the facts (if they be facts), that Sudderth never became guardian for his children, or made any returns of the hire of the negroes for their benefit, or accounted to them for the hire, as all his other dealings with respect to the negroes, would be evidence from which a conversion would be inferred; or from which it might be inferred that he *intended* to keep those negroes as his own, and to give his children (the plaintiffs) other property in lieu of them, in which they acquiesced.

The second question can only arise if it be found that he did convert them. In that event the question would arise, which I have before adverted to, whether the supposed gifts to his children were intended as payments of the debt incurred by the conversion, or as advancements out of his own estate, leaving that debt subsisting in full. And in case the conversion is found, this second question would be
(353) subject to the presumptions I have suggested.

The parties would probably be entitled to have these questions tried by a jury, and in such a case the Judge should take care properly to instruct the jury, as to the presumptions which should guide them in the absence of countervailing evidence. If the conversion be found, the presumption would exist that the supposed gifts were intended as payments on the debt so incurred. In that case, it will also follow that Sudderth must be charged with the value of the negroes at the time of the conversion, and the plaintiffs will each recover his proportionate share of such value, with

interest if thought proper to be given, subject to such payments as have been made to him.

If, however, it be found that Sudderth continually kept the negroes as the property of his children, he being simply their bailee or trustee, then the mode of making out the present account against him will be correct. There can be no ground for contending that the supposed gifts were payments on a debt found not to exist. They must be regarded as advancements, not to be deducted from the amount of the debt or damages against Sudderth, but to be charged against the children in the settlement of their distributive shares of his estate. In either point of view, the mode adopted in making out the accounts of the gifts to the children is wrong. They must be charged with the value of the property delivered as payments, or advancements, whichever they may be, at their respective dates. The negroes paid, or given, to them in either case were theirs, and the loss by death or emancition was theirs. In this view of the case no question is now presented as to the statute of limitations. The case is remanded to be proceeded in according to this opinion, which will be certified. Neither party will recover costs in this Court in either case.

PER CURIAM. Cause remanded.

The same judgment is given in No. 300. 23,

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(354) J. J. OSBORNE, Assignnee, *v.* JOSEPH HENRY.

1. Questions of costs and security for the prosecution of suits, should as a general rule, be left to the presiding Judge in the Court below, yet a defendant is entitled to invoke the supervisory power of the Supreme Court to protect his rights in regard to the costs of litigation.
2. When an assignee in bankruptcy proposes to take the place of the original plaintiff in a suit, he ought to be required to give an undertaking, or make a money deposit out of the fund, sufficient to cover the costs.
3. Whether an assignee in bankruptcy can sue *in forma pauperis*. Quere? It would seem to fall under the principle, that executors and administrators are not embraced within the provisions of law allowing persons to sue *in forma pauperis*.

This was a rule for security, heard before Cannon, Judge, at Spring Term, 1870, of Henderson Superior Court.

An action was brought by one Israel against the defendant for the conversion of a mule. After the suit was brought Israel became a bankrupt, and the plaintiff was appointed

his assignee, and, on motion, was made party plaintiff in the place of Israel.

A rule for better security was taken upon the assignee, who answered upon affidavit "that said bond was good at the beginning of the suit, and that he was not able to give better security," and asked to be allowed to prosecute with the existing security, which was allowed by the Court.

The defendant at the next term moved to dismiss for want of a prosecution bond, and for "insufficiency of the application to prosecute with existing security." The motion was overruled and the defendant appealed to the Supreme Court.

Ovide Durpree, for plaintiff.
D. Coleman, for defendant.

PEARSON, C. J. At first we were inclined to the opinion that all questions of costs and security for the prosecution, ought to be left to the legal discretion of the Judge (355) in the Court below, and we were reluctant to interfere in his ruling because he being on the spot, could form a better opinion of what would further the ends of justice, from the surroundings of the case, than we are in most cases able to do; such matters, as a general rule, should be left to him. But our conclusion is, that defendants are entitled to invoke the supervisory power of this Court, in order to protect their rights, to be secured in regard to the costs of the litigation.

Here the assignee in bankruptcy proposes to take the place of the original plaintiff, and to proceed with the case for the benefit of the fund in bankruptcy, without making any provision for the costs of the prosecution. He puts his application upon an affidavit, which is wholly deficient in that degree of candor and fair dealing, which a Court has a right to expect. "Said bond was good at the beginning of the Court," leaving it to be inferred that it was not good now; "he is not able to give better security," leaving it to be inferred that he is not able to give the security required by law; and on this he asks "to be allowed to prosecute with existing security," that is, no security at all.

Had Osborne made application to sue "*in forma pauperis*," it would have presented the question whether an assignee in bankruptcy can be allowed to sue without giving security or making a money deposit, which it seems would fall under

the principle that an executor or administrator is not embraced in the provision for suing "*in forma pauperis*," but he seeks to get rid of that objection on the ground of an "existing security," which, as we have seen, is worthless. Even supposing that the security of Israel, the original plaintiff, was solvent and willing to continue bound in the new aspect, which the case had assumed by the intimation of Osborne the assignee.

In the absence of both of these facts, we see no reason why the defendant has not a right to insist upon being secured as to the costs of the litigation. This objection was taken in "apt time."

(356) There is error in the ruling of His Honor, which the Court can review: Osborne, when he applied to to be made plaintiff, and to be allowed to proceed with the action for the benefit of the fund in bankruptcy, ought to have been required to give an undertaking or make a money deposit out of the fund, sufficient to cover the costs.

If the objection had not been taken in "apt time," and the case had been allowed to go on until it was called for trial, His Honor might well have exercised the discretion to order the trial to proceed, without further security, inasmuch as no further costs would be incurred, and the motion to dismiss at that stage would have been a manifest attempt to stifle justice.

Error; this will be certified.

PER CURIAM. Judgment reversed.

L. P. BAYNE & CO. *v.* DAVID A. JENKINS, Treasurer.

1. Mandamus will not lie to compel the Treasurer to pay money on any claim against the State, until the same has been passed upon and a warrant issued by the Auditor for that purpose.
2. When the Legislature has forbidden a warrant to be issued, the claimant must apply to that body for redress, or institute proceedings in the Supreme Court.

Boner v. *Adams* and *Jenkins*, 65 N. C., 639, cited and approved.

This was an application for a writ of mandamus against the Treasurer of the State to compel him to pay certain *coupons* on bonds which had theretofore been issued by the State. It is not thought necessary to state the facts more fully, as the case is decided upon the power of the Court to issue a mandamus against the Treasurer, under the state of

facts set forth in the opinion of the Court. The ap-
(357) plication for the writ of mandamus was made before His Honor, Judge Watts, at Chambers, February 16th, 1870. His Honor declined to issue the writ, and the plaintiffs appealed to the Supreme Court.

Batchelor, for plaintiffs.
K. P. Battle, for the Treasurer.

1. The action should be against the Auditor. Past due coupons are a claim against the State, and cannot be paid regularly without a warrant from him. Laws of 1868–'69, chap. 270, sections 63 and 71.

2. The action will not lie, because there is no appropriation act. The act authorizing payment of plaintiff's coupons is repealed. Act of 1869–'70, chap. 71.

3. Mandamus does not lie against the Auditor, to compel him to audit a claim, or against the Treasurer to pay it. *Cotton* v. *Ellis*, 7 Jones, 545, is certainly contrary to many cases decided by the Supreme Court of the United States. See *U. S.* v. *Guthrie*, 17 Howard, 284; *U. S.* v. *Seaman*, 21 Curtis' edition U. S. Reports, 470; *Decatur* v. *Plauding*, 14 Peters, 497; *U. S.* v. *Commissioners*, 5 Wallace, 563.

These cases show that mandamus will lie against one of the heads of the Executive Departments, only where his duty is simply clerical. Where his discretion is to be exercised in any respect, the action cannot be maintained, nor can he be compelled by mandamus to do anything in the line of his official duties. See *Attorney General* v. *Justices of Guilford*, 5 Ired., 315; *State* v. *Bonner*, Busbee, 257.

If each Superior Court in the State could order the Treasurer to pay out moneys or command the Auditor to issue warrants, the fiscal concerns of the State could not be regularly or intelligently conducted. All claimants could *in effect sue a sovereign State* by resorting to *mandamus* against the officers in charge of her funds.

(358) The remedy of claimants, in case of *corrupt refusal* by the Auditor or Treasurer is pointed out in *Attorney General* v. *Justices of Guilford*. He may be impeached or indicted, or resort may be had to the Legislature.

4. The Constitution of the State (Art. IV, sec. 11) gives the Supreme Court original jurisdiction to hear claims against the State, its decisions to be merely recommendatory. This

is a clear exclusion of the right to resort to the Superior Court by *mandamus*.

5, As the money raised by the special tax for the Western R. R. Co., is not nearly sufficient to pay all the coupons, it is submitted that the plaintiffs are entitled in no Court to more than their rateable share.

6. The appropriation to this company is unconstitutional, because by the act the route is materially changed from what it was at the adoption of the Constitution. *Galloway* v. *Jenkins*, 63 N. C. Rep., p. 147. Besides other variations, one section of the act authorizes a branch road to be built, to connect Fayetteville with the Wilmington, Charlotte and Rutherford Railroad. The petitioner does not allege that the bonds issued were not to be used for this purpose.

READE, J. The case of *Boner* v. *Adams* and *Jenkins*, 65 N. C., 639, is decisive of this case.

It is there said, "The Treasurer, Jenkins, can pay no money out of the Treasury except on the warrant of the Auditor. Acts of 1868–'69, ch. 270, sec. 71.

In this case there is not only no warrant from the Auditor, but it is stated in the complaint that the Legislature has forbid the Treasurer to pay the plaintiff. And the Auditor in his warrant upon the treasurer, in any case, must recite the law under which it was issued, and as the Legislature has expressly forbid a warrant or the payment of money in this case, the Auditor could not issue a warrant. It would seem that even if the Auditor had been embraced by the plaintiff's demand the result must have been the same. If the
(359) plaintiff have a claim, as alleged, it seems that his remedy is an application to the Legislature, or a suit originated in this Court.

There is no error.

PER CURIAM. Judgment affirmed.

JOHN T. COUNCIL *v.* JOHN S. WILLIS and ANGUS W. FADGEN.

1. Where a judgment was obtained in a court of law, and an injunction was afterwards issued to restrain the collection of it, which injunction was dissolved and judgment entered upon the injunction bond; *Held*, that a motion to vacate the latter judgment, upon the allegation that the *original one* had been satisfied by payment to the sheriff could not be entertained.

2. If such payment bad been made, the regular and proper course would have been to plead the same, or to have satisfaction entered upon the record, and not to offer proof of payment upon a motion to vacate a regular judgment.

This was a motion to vacate a judgment on an injunction bond, heard before Russell, Judge, at Fall Term, 1871, of Bladen Superior Court.

The facts upon which this motion were predicated are stated sufficiently in the opinion delivered by the Court. The motion was overruled by His Honor, from which the defendant appealed to the Supreme Court.

W. McL. McKay, for the plaintiff.
Strong and *Young*, for the defendant.

READE, J. The facts, so far as they are necessary to be stated, are, that defendants had judgment at law against plaintiff; which judgment the plaintiff filed a bill in equity to enjoin, and did enjoin temporarily; but the injunction was afterwards dissolved, and then the defendants failing to make the money on their judgment at law, obtained judg-
(360) ment against the plaintiff upon the injunction bond, at June Term, 1867. And this motion is to vacate the judgment obtained on the injunction bond. There is no irregularity apparent on the record, and therefore the motion was properly overruled. The fact relied on as affording merit to the plaintiff's cause, was a receipt exhibited from the Sheriff, who had the execution in the original judgment at law for collection, which receipt was dated 5th October, 1854, and was for so much, in full payment of the execution.

The proper way for plaintiff to have availed himself of this receipt was to plead it in *satisfaction* of the judgment and not offer it upon motion to *vacate*. Why vacate a regular judgment because it had been satisfied? If, however, the receipt were what it purports to be, we should regret that the plaintiff should lose the benefit of it, by a technical slip, and if there were any other way to give him the substantial benefit of it, we would do so, but it was conceded, that the payment to the sheriff was in Confederate Treasury notes, which had ceased to have value in the payment of old debts; as this was, and their worthlessness was notice, both to the Sheriff and to the plaintiff, that they would not be received by the creditor. Probably for this reason the payment was not

pleaded. So it would seem that the plaintiffs defence was as unconscientious as it was informal.

No error.

PER CURIAM. Judgment affirmed.

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(361) R. S. PULLEN *v.* THE COMMISSIONERS OF WAKE COUNTY.

1. The General Assembly have an unlimited right to tax all persons domiciled within the State, and all property within the State, except so far as this right has been limited by the Constitution, either by express words or by necessary implication.
2. The General Assembly has under this general power the right to tax legacies, collateral descents, &c., and when such tax is imposed upon the succession, or on the right of the legatee to take under the will, the power is not restrained or limited by the provisions of the Constitution relative to the tax on property.
3. Therefore the Revenue Act of 1870–'71, imposing a tax on legacies, &c., is not unconstitutional, yet it cannot be retrospective in its character.

This was a petition to correct the tax list for the year 1871, heard before Watts, Judge, at the Special Term of Wake Superior Court, January, 1872.

The petition was heard before the County Commissioners of Wake.

They refused to grant the relief prayed for, and the petitioner appealed to the Superior Court.

Upon the hearing before Judge Watts, the order of the Commissioners was reversed, and an order made to correct the tax list. From this order, &c. The Commissioners appealed to the Supreme Court.

The facts upon which the application is founded, are sufficiently stated in the opinion of the Court.

Moore & Gatling, for petitioner.
Attorney-General and *Badger*, for the Commissioners.

RODMAN, J. Penelope Smith died in October, 1870, leaving a will by which she bequeathed $30,000 of personal property to strangers, and made the plaintiff her executor.
(362) The executor presented his complaint to the Commissioners for Wake county, that the said property had been assessed for taxation for the year 1871, at the rate of $2\frac{1}{2}$ per cent. on its value for a tax to the State, and a like rate for the county; and prayed that he might be relieved of

the tax. The Commissioners refused his demand, whereupon he appealed to the Superior Court, where the Judge corrected the tax list by striking out the tax altogether, from which order the Commissioners appealed to this Court.

Supposing that the Legislature has a constitutional right to impose a tax on legacies to other than lineal descendants, we think His Honor was wrong in striking out the tax altogether.

It is clear that the legacy cannot be taxed under the Act of April, 1871, (Acts, 1870–'71, ch. 227,) which does not profess to be retrospective, and could not constitutionally be so. "Constitution, Bill of Rights, sec. 32." If taxable at all, it was so under the Act of 1869–'70, ch. 108, which was in force at the death of the testatrix, and imposed a tax of one per cent. on the value of the legacy. It does not appear that the Commissioners had imposed any tax on legacies before the death of the testatrix. They were not entitled to impose any afterwards to effect her estate So that the only question presented, is upon the validity of the tax of one per cent. imposed by the Act of 1869–'79.

It will be assumed in the present case as an axiom not needing discussion that the Legislature has an unlimited right to tax all persons domiciled within the State, and all property within the State, except so far as that right has not been limited either by express words of the State Constitution, or by plain implications. The power to tax is an attribute of sovereignty so vital and so necessary to the existence of a State, that it cannot be held to have been forbidden as to any particular subject, except where the policy obviously commends itself to our sense of justice, or is most clearly expressed. *McCullouch* v. *State of Maryland*, 4 Wheat., 316.

(363) It is contended, however, that this sovereign right has been so limited by that provision of the Constitution which requires that all property shall be taxed uniformly, and which limits the rate of State taxation to a maximum of two-thirds of one per cent.

Undoubtedly, if the tax in question must necessarily be regarded as a tax on property, the objection would be irresistible, since this property is not only taxed uniformly with other property, but is subjected to taxation as a legacy in addition. But we do not regard the tax in question as a tax on property, but rather as a tax imposed on the succession—on the right of the legatee to take under the will, or of a collateral dis-

tribution in the case of intestacy. The counsel did not refer us to any authority on the point and we are not aware of any. The cases of *Alvany* v. *Powell*, 2 Jones Eq,, 51, and *State* v. *Brim*, 4 Jones Eq., 300, have no bearing on it. They merely construe the statute then existing, and hold that its intention was to make the actual location of the property at the death of the predecessor a test of its liability to the tax, rather than his domicil, which last had been the rule in the English decisions. Neither can it be held a tax on property, merely, because the amount of the tax is measured by the value of the property.

Putting these arguments aside, is there any reason why the State shall be denied the power to tax a succession whether it be by gift *inter vivos* or by will or intestacy? Property itself, as well as the succession to it, is the creature of positive law. The legislative power declares what objects in nature may be held as property; it provides by what forms and on what conditions it may be transmitted from one person to another; it confines the right of inheriting to certain persons, whom it defines heirs, and on the failure of such it takes the property to the State as an escheat.

The right to give or take property is not one of those natural and inalienable rights which are supposed to precede all government, and which no government can rightfully impair.

There was a time, at least as to gift by will, it did not
(364) exist; and there may be a time again when it will seem wise and expedient to deny it. These are the uncontested powers of the Legislature upon which no article of the Constitution has laid its hands to impair them. If the Legislature may destroy this right, may it not regulate it? May it not impose conditions upon its exercise? And the condition it has imposed in this case is a tax. It is argued, however, that because the Constitution (Art V. sec 3) says that "the General Assembly may also tax trades, professions, franchises and incomes," and as this right of succession cannot be technically classed under either of these heads, it must be implied that the Legislature was forbidden to tax such a right, on the rule of interpretation that the expression of one thing implies the exclusion of any other. We think the implication is too slight to restrict the legislative power in the exercise of so vital a portion of it as that of taxation; and especially so, when we conceive of no reason of policy or justice requiring such a restriction. It might as well be con-

tented that, since sec. 6 says the Legislature may exempt cemeteries, &c., enumerating several matters of which the right in question is not one, the Legislature was thereby impliedly forbidden to exempt this right, or any other possible subject of taxation, whatever, not mentioned in the section. It is not by such artificial rules that Constitutions are to be construed.

It is ordered that the assessment be modified by striking out the tax to the county altogether and by reducing the State tax to one per cent. on the value of the legacy.

PER CURIAM. Error.

(365) BANK OF CHARLOTTE *v.* E. H. BRITTON, *et al*,

1. A demurrer for want of jurisdiction can only be sustained where the want of jurisdiction appears upon the face of the complaint.
2. Where a note was given in 1863, there is a presumption that it was given for a loan in Confederate money; but that presumption is not conclusive. The facts necessary to authorize the application of the legislative scale are matters of defence, and must be pleaded when the note sued on does not *prima facie* show that it is applicable, and when it does so show, a defendant must in some way claim the application of the scale.
3. A demurrer to the jurisdiction of the Superior Court will not be sustained, where it appears in the complaint that the note sued on was for more than $200; notwithstanding said note may *prima facie* be subject to the legislative scale.

This was a civil action tried before Logan, Judge, at Fall Term, 1871, of Mecklenburg Superior Court.

Plaintiff alleged in his complaint:

I. That it is a corporation duly created by law.

II. That on the 24th of November, 1863, the defendants, by their note, promised to pay plaintiff, eighty-three days after date, $750.

III. That no part thereof had been paid.

Plaintiff demanded judgment for the amount of the note and interest.

Defendants demurred, and assigned as cause of demurrer, that it appeared on the face of the complaint that the Court had no jurisdiction of the amount due being less than $200.

On motion of plaintiff's counsel, the demurrer was overruled, from which judgment the defendants appealed to the Supreme Court.

J. H. Wilson, for plaintiff.

Vance & Dowd, for defendants.

(366) RODMAN, J. A demurrer for want of jurisdiction can be sustained only when the want of jurisdiction appears on the face of the complaint. Here the sum demanded exceeds $200. But the defendant argues that, inasmuch as the claim is upon a note made in 1863, there is a presumption, by virtue of the Acts of 1866–'67, that the note was given upon a loan of Confederate money, and was payable in like currency, and therefore the scale must be applied, which would reduce the demand to less than $200. This presumption however is not conclusive; it does not necessarily follow from the date of the note; it is open to the plaintiff to show by evidence that the consideration of the note was other than a loan of Confederate money, or that it was agreed to be paid in some other money. By the demurrer which assumes that the presumption is conclusive, the plaintiff would be cut off from this proof and subjected to the scale in a case to which the statute may not apply. It is true the plaintiff might avoid this unjust result, by setting out in his complaint the particular fact which exempted his demand from the scale, but we think he was not bound to do this. A plaintiff is never bound to anticipate a defence which perhaps may not be set up. The facts to authorize the application of the scale are matters of defence and must be pleaded as such where the note sued on does not (as it does here) show *prima facie* that the scale is applicable to it, and where it does so show, then the defendant must in some way claim the application of the scale. We think the demurrer was properly overruled. The appeal is from the interlocutory judgment overruling the demurrer, and consequently we are not called to give final judgment.

This opinion will be certified to the Superior Court in order that it may proceed according to law.

PER CURIAM. Judgment affirmed.

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(367) WILLIAM NORTON, Adm'r *v.* THOMAS EDWARDS, *et al.*

1. Where an administrator sold land of his intestate for the payment of debts and previous to the sale an agreement was made between him and the creditor of the estate, "That if he would buy the land he should have credit on certain claims and notes over which he had control, and which were due from the intestate, to the amount that he (the administrator) could pay *pro rata*;" and the creditor on the faith of such agreement bought the land; *Held*, that in an action on the bond given for the purchase money, the defendant had a right to give

in evidence the agreement, and was entitled to a credit according to its terms; *Held further*, that such agreement need not be reduced to writing and that it was not contrary to the policy of the law.

The distinction between this case and *Brandon* v. *Allison* stated by Reade, J.

Williams v. *Chaffin*, 2 Dev. 333, cited and approved.

This was a civil action tried at Fall Term of Jackson Superior Court, Cannon, Judge, presiding.

Plaintiff alleged in his complaint, that as administrator of one Kilgon, he had obtained license to sell the real estate of his intestate to pay debts; that he sold the said real estate, and that one of the defendants became the purchaser, and executed his bond with the other defendant as surety; that the bond was unpaid, &c. He demanded judgment for the amount of bond and interest.

Defendant admitted the execution of the bond and the consideration. He insisted in the answer that he was entitled to a credit upon said bond. That previous to the sale there was an agreement between him and the administrator, that if the defendant would buy the land, he should have credit upon certain claims or notes due from the estate to the amount of his *pro rata* share of the assets, &c.

Plaintiff, in a replication, denies this agreement.

Upon the trial before His Honor, defendant proposed to prove the agreement. Plaintiff objected. His Honor admitted the testimony.

(368) The jury under instructions from the Court, found specially "That the plaintiff contracted with the defendant to allow his credit for the *pro rata* amount due upon the several notes set forth in the answer.

There was a judgment for the amount of the bond, subject to a credit of the *pro rata* amount that may be due upon the notes set forth in the answer. A reference was made to the Clerk to take account of the estate, and ascertain defendant's *pra rata* share.

From this judgment the plaintiff appealed.

Phillips & Merrimon, for the plaintiff.
Busbee & Busbee, for the defendant.

READE, J. The opinion delivered in *Brandon* v. *Allison, et al.*, at this term, would be decisive against the riget of the defendant to have his set off or counter-claim allowed in this case, if it were not for this difference in the two cases: In

that case the defendant bought the land sold by the plaintiff to make assets, and gave his bond, and when sued on the bond he offered a *quando* judgment against the plaintiff as a counter-claim which was not allowed, because, among other reasons, the administrator required the funds to answer other judgments and demands; and there was no agreement on the part of the plaintiff administrator that the defendant should have credit for his bid, or any part of it, or that he should be paid or allowed his *quando* judgment as a counter-claim.

But here there was an express agreement between the plaintiff and the defendant, that if the defendant would buy the land at the sale, he would be allowed to credit on certain claims which he held against plaintiff's intestate, such amount as would be his *pro rata* with the other creditors of the estate, and then, for that amount, the defendant should have credit on the bonds which he should give for the price of the land. And now in this suit upon the bonds (369) which he gave for the price of the land, he insists that he is entitled to a credit or counter-claim as agreed, for so much as will be his *pro rata* with the other creditors, of the assets of the estate.

It is insisted for the plaintiff that he is not bound by the agreement because of the statute which provides that an administer shall not be charged upon a special promise to answer damages out of his own estate unless the agreement shall be in writing, signed, &c. *Rev. Code*, ch. 50, sec. 15. The answer to this objection is, that this is not an agreement to answer out of *his own estate*, but out of the estate of his *intestate*. See *Williams* v. *Chaffin*, 2 Dev. R. 333.

In the next place the plaintiff insists that the agreement was against public policy and ought not to be enforced. And it is likened to conveyances in trust to pay debts with a provision that those who bid for property shall be allowed to credit the bid upon their claim against the debtor, the effect of which is to give a ficticious, and in some instances, fabulous value to property and to defraud creditors. Probably there might be cases where purchasers would be relieved from such purchases or where such contracts would not be enforced, but if so, it would only be at the instance of the person imposed on—the purchaser or creditor. And here the purchaser does not complain of any such imposition, but he is seeking to enforce it. It would indeed be monstrous, if in

such case as is referred to, a purchaser at a fabulous price were held to pay up his bid and not be allowed his claim as agreed on. And if the case before us is a case of that sort, that is just what is sought to be done if the defendant is not allowed a *pro rata* of his claim upon his bid. The plaintiff is seeking to make the defendant pay up his bid, fabulous if it were, without allowing him to pay it, or any part of it, with his claim. But we do not understand that the agreement and sale were of the objectionable character of those alluded to. The proposition was not that, if you will buy this land you may pay for it with your debt against the estate to the exclusion of all the other creditors of the estate; but it was:
(370) if you will buy the land the proceeds shall be applied to the payment of all the debts of the estate *pro rata*, your claim among the rest, and so much as will be your share you need not pay up, but may retain and credit the amount upon your claims. The impolicy of such an agreement, or how it was intended to injure anyone, does not appear to us.

There is no error. The case is not in a condition for us to enter judgment here for the plaintiff, or the amount to which he is entitled, because the verdict below did not find the amount of the credit or counter-claim to which the defendant was entitled, and there was a reference to the Clerk to report the amount, and at that stage of the proceedings the appeal was taken. This must be certified, therefore, to the Court below to the end that the amount to which the defendant is entitled as a creditor or counter-claim be ascertained, and after allowing it there should be judgment for the plaintiff for the balance of the bonds sued on. The costs in this Court will be paid by the plaintiff.

PER CURIAM. Judgment affirmed.

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(371) J. F. GORE *v.* M. MASTIN, Sheriff.

1. A tax list prepared and delivered to a sheriff, according to the provisions of the Revised Code, chap. 99, constituted authority for the collection of taxes, and was of the same force and effect, as an execution issuing from the County Court upon a judgment rendered in said Court in a matter within their jurisdiction, and it is no part of the duty of a sheriff to enquire whether the taxes were properly laid or not.

2. The sheriff being a public officer, is not bound to have a regularly certified list of taxables with him when he distrains for taxes; it is sufficient that the list was made out and delivered to him.

3. The legality of a tax cannot be tested in an action brought to recover the value of property distrained and sold by a sheriff under and by authority af a tax list in his hands.

Huggins v. *Simpson*, Phillips' law, 126; *State* v. *Fulton*, at this Term.

This was a civil action tried before Cloud, Judge, at Spring Term, 1871, of Forsyth Superior Court.

Plaintiff complained that the defendant had wrongfully taken a mule out of his possession and sold it.

The defendant, who was the sheriff of Forsyth County, admitted the taking, but justified the seizure, viz.: that he had seized the mule under a distraint for taxes due from the plaintiff, and which had been assessed by the justices of said County, under the charter of the N. W. N. C. R. R. Co. The defendant offered in evidence a book containing the amount of taxes due from the tax-payers of said County for the year 1868. The former Clerk of the County Court certified that it was a true copy of the tax lists for 1868, as taken from the original, and that he delivered it to the sheriff to collect taxes for State and County purposes; that it was arranged alphabetically, and contained the names and subjects of taxation other than railroad tax. This book was made out from the assessment made and returned to the Clerk in May,
(372) 1868, and did not refer to any railroad tax. Defendant also offered in evidence the record of the County Court, directing a vote to be taken upon a subscription by the County for a number of shares in the N. W. N. C. R. R. Co., and a subsequent order by the justices of said County, directing a tax to be levied on all persons and subjects of taxation, now taxable for State and County tax for the present year, and that said sheriff collect the taxes amounting to and upon the tax list as made out by the clerk of this Court for the present year.

Plaintiff insisted that no order could be made by the justice, directing the sheriff to collect the railroad taxes, except by an assessment of the property of the tax-payer made after the order, &c. There was a verdict for the plaintiff Judgment and appeal by the defendant.

W. M. Robbins, *Scales & Scales* and *Dillard & Gilmer*, for plaintiff.

Masten, Blackmer & McCorkle and *T. J. Wilson*, for defendant.

BOYDEN, J. Under our former system, it was made the duty of the County Court, at the first session held after the

first day of April, annually to appoint for each captain's district a Justice of the Peace to take a list of the taxable property. Rev. Code, ch. 99, sec. 53. This list taken by the Justice, of taxables, was to be returned to the Clerk of the County Court at the next term after the time prescribed for taking the list—sec. 66, same chap.—and the Clerk of the Court was directed, on or before the 1st day of April, in the year ensuing the taking of the lists, to deliver to the Sheriff of the county a full and accurate copy, in alphabetical order, of the lists. Sec. 81, same chap. And the Sheriff was directed forthwith to proceed to collect such taxes, sec. 82. This list, thus prepared and furnished the Sheriff, constituted the authority of the Sheriff for the collection of the
(373) taxes, and was of the same force and effect as an execution issuing from the County Court upon a judgment therein rendered, in the matter of which the same Court had jurisdiction. It was no part of the duty of the Sheriff to inquire whether these taxes were properly laid or not; he was commanded forthwith to collect these taxes, and it was the duty of the tax-payers to pay to the Sheriff these taxes thus assessed, when demanded. By sec. 87, chap. 99, the Sheriff is authorized, if need be, to destrain and sell the property of the tax-payer to satisfy the same.

In our case the Sheriff seized the mule for which this suit is bronght, and sold it to satisfy the tax, which the plaintiff declined to pay. The Sheriff after retaining the tax and his costs and charges, tendered the balance of the price for which the mule sold, to the plaintiff. In all this the Sheriff was in the strict line of his duty. The Sheriff being a public officer was not bound to have a regularly certified list of taxables with him when he distrained, nor was he obliged to have any list with him; it was quite sufficient that the list had been made out by the Clerk of the County Court and delivered to the Sheriff.

In this case the plaintiff had no cause of action against the Sheriff, as he was himself in fault in not paying his tax when demanded.

We suppose it was one of the objects of this action to test the legality of this railroad tax. It is sufficient to say that the legality of this tax cannot be tested in this way. *State* v. *Fulton*, at this Term. *Huggins* v. *Hinson*, Phillips law, 126.

This renders it unnecessary to notice the questions as to the rejection of the tax list offered by the defendant.

There is error. This will be certified.

PER CURIAM. *Venire de novo.*

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(374) PARKER & GATLING *v.* W. O. HOUSE *et al.*

1. A judgment by default for want of an answer, admits that the plaintiff had a good cause of action and that he is entitled to some damages.
2. In such case, if the plaintiff's claim for damages is certain or can be rendered certain, by mere computation, there is no need of proof, as the judgment by default admits the claim—but when the measure of damages is uncertain, the assessment must be made upon proof—and the *onus* as to the amount is upon the plaintiff.
3. Therefore, where there was a judgment by default in a suit on a constable's bond, the plaintiff must prove that the debtors were solvent, and the amount of damage sustained by the constable not using proper diligence in collecting the claims placed in his hands.

Parker & Gatling v. *W. H. Smith*, 64 N. C., 291; *Warlick* v. *Barnett*, 1 Jones, 529, cited and approved.

This was an action on a constable's bond, tried before Watts, Judge, at a Special Term of Halifax Superior Court.

The plaintiff declared upon a constable's bond and assigned as a breach, that the officer had not used due diligence in endeavoring to collect certain claims placed in his hands. A complaint was filed setting forth the different claims placed in the hands of the officer.

The defendants failed to answer, and at the return term a judgment was entered by default and enquiry.

At the Special Term aforesaid, the plaintiff proposed to execute the enquiry, and a jury was empannelled for that purpose, he read his complaint and the receipt of the constable, and stopped his case.

The defendant's counsel asked the Court to instruct the jury that the plaintiff was not entitled to recover, because he had failed to prove the appointment of the constable, and the execution of the bond sued on. That he had failed to prove the insolvency of the parties, or any of them, (375) upon whom claims had been given to the officer, and that no demand had been proved.

His Honor declined to so charge, but told the jury that the plaintiff was entitled to recover the amount of his claims set forth in the complaint. The jury returned a verdict in ac-

cordance with the instructions. Judgment and appeal by the defendants.

Moore & Gatling, for plaintiffs.
Batchelor, for defendant.

DICK, J. This is an action against a constable on his official bond, for a failure to perform his official duty. The default of the defendant in failing to answer, admits the execution of the bond sued on, and that the plaintiffs have good cause of action, and the only question left for determination is the amount of damages.

The C. C. P., sec. 217, makes provision for determining the amount of a judgment by default.

1. In any action arising on contract for the recovery of money only, the clerk ascertains the amount which the plaintiff is entitled to recover, in the manner prescribed in said section.

2. In other actions the Judge before whom an action is pending may, upon proofs, ascertain the damages, or he may order a reference for that purpose, or have the damages assessed by a jury.

The judgment by default in this case admits that the plaintiffs are entitled to recover something, but in all cases of judgment for the want of an answer, where the complaint is not sworn to, the amount must be ascertained upon proofs, except where there is an instrument for the payment of money only.

(376) The breach of the official bond assigned in the complaint is, that the defendant did not use due diligence in collecting claims put into his hands as an officer.

The defendant, by failing to answer, admits this allegation, but does not admit the amount of damages, for this is the question to be determined upon proofs. The plaintiffs cannot reasonably insist, that their unsworn statement should fix the amount of damages, when the injustice of such a proposition is so apparent, and the law is so positive to the contrary.

The plaintiffs must show their debtors were solvent, and the amount of damages which they sustained by the defendant not using proper diligence to collect their claims. If the debtors were insolvent the law did not require diligence on the part of the defendant, as it would have availed nothing.

State on relation, *Warlick* v. *Barnett*, 1 Jones, 539, and cases cited.

The rules of law as to proceedings on a writ of enquiry are stated in *Parker & Gatling* v. *Smith*, 64 N. C., 291.

There was error in the ruling of His Honor. This will be certified that proper proceedings may be had to determine the amount of damages.

PER CURIAM. Judgment reversed.

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(377) SARAH REECE *v.* JAMES REECE AND WIFE.

1. A defendant has a right, at the return term of a summons in an action, to demand of the plaintiff's counsel his authority for entering an appearance. Rev. Code, ch. 31, sec. 57, Rule 16.
2. If the demand for the power of attorney be made at the return term, it is the practice and within the discretion of the Judge to extend the time; if, however, such demand is not made at the proper time, and before the right to appear has been recognized, it comes too late; unless there be peculiar circumstances tending to excuse the party for not making it in apt time.

Motion to dismiss for want of a power of attorney, heard before Henry, Judge, at Fall Term, 1871, of Watauga Superior Court.

The action was brought in the name of plaintiff to use of Hagerman. The complaint and answer was filed at Spring Term, 1871. At Fall Term, 1871, the defendant filed an affidavit stating that plaintiff's name had been used without authority, and asked for a rule on Hagerman, and the attorneys of record to show cause why the suit should not be dismissed for want of "authority to appear."

His Honor allowed Hagerman's name to be erased. Plaintiff's attorneys insisted that the filing of the complaint and answer at Spring Term, without objection, was a sufficient answer to the rule, and that they were not bound at the trial term to show special authority. His Honor held otherwise, and ordered the suit to be dismissed.

From this judgment the plaintiff appealed.

Folk, for plaintiff.
Dupree, for defendant.

BOYDEN, J. The defendants at the return term had an undoubted right to demand of the plaintiff's counsel their au-

thority for entering an appearance. Rev. Code, chap. 31, sec. 57, rule 16 of that section.

(378) But if this demand for a power of attorney authorizing the counsel to enter an appearance had been made at the return term, it has been the universal practice to give time until the next term to produce and file his power of attorney or authority, and it is within the discretion of the Court to grant this indulgence.

It has often been ruled on the circuit, by the most distinguished Judges in our State, that if this demand is not made in proper time, and before the right to appear has been recognized, the demand comes too late. And this we think the proper rule; unless there are some peculiar circumstances tending to excuse the party for not making the demand in apt time.

But however this may be, parties will not be indulged in such improper practice, as to lie by until the cause is called for trial, and then, for the first time, demand this authority; and if not provided at once, insist upon a dismissal of the cause. In our case the defendants had recognized the right of the counsel to appear by answering the complaint they had filed at the previous term, and also by procuring an order to take the testimony of the plaintiff *de bene esse.*

There is error. This will be certified.

PER CURIAM. Judgment reversed.

(379) RICHARD LEDBETTER *v.* J. I. OSBORNE.

1. Where a judgment was obtained before a Justice of the Peace, and docketed in the office of the Superior Court Clerk, the Court has no power, upon motion, to set aside said judgment, and enter the cause upon the civil issue docket.
2. If a party has merits and desires a new trial in the Superior Court, upon a matter heard before a Justice of the Peace, he must by a proper application, obtain a writ of *recordari* as a substitute for an appeal. The writ of *recordari* and not *certiorari* is the proper remedy, the Justice's Court not being a Court of record.

This was an application based upon a petition, to set aside a judgment, heard before Cannon, Judge, at Fall Term, 1871, of Henderson Superior Court.

The facts stated in the case sent to this Court seem to be as follows: The plaintiff Ledbetter was indebted to one Noah Henry as administrator, as surety for one William Henry. He was sued by said administrator before a justice of the

peace. The trial was postponed for a few days, shortly after the suit was brought, the note was transferred to J. I. Osborne. The warrant was amended, and suit carried on in Osborne's name. Judgment was obtained before the Justice of the Peace. This judgment was docketed in Henderson and Buncombe counties. After the judgment was docketed, and execution about to issue from the Superior Court, Ledbetter filed a petition before His Honor, Judge Cannon, asking for an injunction, "and that said judgment may be opened and placed upon the civil issue docket as an appeal." A restraining order was granted.

The petition set forth facts tending to show surprise, and charging that advantage had been taken of petitioner's ignorance of law, &c.

(380) The case being heard before His Honor, the petition was dismissed, and plaintiff Ledbetter appealed.

No Counsel, for plaintiff.
J. H. Merrimon, for defendant.

DICK, J. A judgment in a Justice's Court does not create a lien upon the property of the defendant. To have this effect a transcript of the judgment must be filed, and docketed in the office of the Superior Court Clerk of the county, where the judgment rendered. C. C. P., sec. 503.

This proceeding places the judgment on the judgment docket of the Superior Court to create a lien and for the purposes of execution, and in this respect only is it a judgment of the Superior Court. The record of proceedings and the original papers in the cause remain in the Court of the Justice, and the case can only be regularly carried to the trial docket of the Superior Court by appeal.

This application is in the nature of a motion in the cause to set aside the judgment and grant a new trial upon the merits. The motion was properly refused by His Honor, as the case was *coram non judice*. If the plaintiff has merits, and has not been guilty of unreasonable *laches*, he may, upon a proper application, obtain a writ of *recordari* as a substitute for an appeal. The writ of *recordari* is the proper remedy, and not a *certiorari*. A Justice's Court is an inferior court of limited jurisdiction, not proceeding according to the course of common law, and although a justice is required to keep a docket and enter his proceedings, this does not constitute his court a court of record. When an appeal is taken

from his judgment, he does not send up a duly certified transcript of record as the foundation of the action of the appellate Court, but he is also required to file the original papers in the cause. C. C. P., sec. 537, 540.

PER CURIAM. Judgment affirmed.

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(381) JOHN A. LONG *v.* A. T. COLE and others.

1. When a rule was taken upon the Clerk of the Superior Court, to show cause why he should not pay a certain sum of money decreed to be paid out of funds in his hands, it is no answer to the rule to set forth facts tending to show that the original decree was erroneous.
2. An error in a decree cannot be corrected or reviewed under a rule to show cause. To effect that purpose regular proceedings must be instituted having that end in view.

Rule upon the Clerk of the Superior Court of Richmond, heard before Buxton, Judge, at Chambers.

The rule was based upon affidavit and is in these words, to-wit:

"Ordered, that the Clerk of this Court pay to A. T. Cole $200, adjudged him, as it is alleged, at the last term of this Court, to be paid out of funds in the hands of the Clerk, or show cause to the contrary before the Judge, at Fayetteville, on the 1st day of June next."

John A. Long appeared and answered the rule as follows:

"A bill in equity was filed by him against the defendants and others for an account of partnership between the defendants and himself. That an answer was filed and a reference made under an order of the Court at Fall Term, 1870. A report was made by the commissioners and a decree entered, confirming the report and declaring that the report should be the judgment of the Court. That the cause was heard by the presiding Judge on Wednesday night of the first week of the term and on the eve of adjournment and as he believes in a hurried manner; and that owing to the haste, and hurried manner in which the same was heard and the decree entered, he believes that great injustice was done him. That he was advised that great errors were made by the
(382) commissioner in his report, and that he received evidence which was expected to and which was illegal."

PEARSON, C. J. The answer to the rule is considered, by this Court, as irresponsive and insufficient.

The error in the decree, in the original case, if there be any, cannot be reheard or revised, under a rule to show cause, &c. To effect that purpose, the party must take such proceedings, as he may be advised.

The judgment of the Court below, is reversed. This will be certified to the end that such further proceedings may be had, under the rule, as are agreeable to law.

The costs will be paid by the respondent, including the cost of the volumes of matter, which was unnecessarily copied and sent up to this Court.

PER CURIAM. Judgment affirmed.

DUNCAN CROMARTIE and wife MARY ANN *et al*, *v.* ANDREW S. KEMP, *et al.*

When lands descend to collateral relations under the Act of 1868 (Rev. Code, ch. 38, sec. 1, rule 4,) the collateral relations of equal degree take *per stirpes* and not *per capita.*

Clement v. *Caudle*, 1 Jones Eq., 82; *Hayes* v. *Johnson*, 5 Jones Eq., 124, cited and approved.

Civil action for partition of land, heard before Russell, Judge, at Fall Term, 1871, of Bladen Superior Court.

The plaintiffs allege in their complaint that William J. McKay died intestate in the county of Bladen, leaving as his only heirs the plaintiffs and defendants, who are related to him in the following order, to-wit: Mary Ann, wife of the plaintiff, Duncan Cromartie, is a niece of the said Wm. J. McKay and only child of his deceased brother John L. McKay. (383) That the other plaintiffs, seven in number, are the grandchildren of Archibald McKay, another deceased brother of the said William. And that the defendants, five in number, are the children of a deceased sister of the said William J. McKay.

The plaintiffs further allege that the said Wm. J. McKay was the owner in fee simple of nearly fifteen thousand acres of land, and asked that said lands be divided into three equal shares; that one share thereof be allotted to the plaintiff, Mary Ann, wife of Duncan Cromartie; that another share be allotted to the other plaintiffs, which shall be subdivided into seven equal shares, one-seventh of one-third being for each of said plaintiffs; and that another share of said lands be allotted to the defendants, which shall be subdivided into five equal shares, (there being five children of

the deceased sister of the said Wm. J. McKay) one-fifth of one-third of each of them.

The defendants, in their answer, admitted the degrees of relationship as alleged in the complaint, but insisted that said lands should be divided into seven shares, of which one share should be given to the plaintiff, Mary Ann Cromartie, one share to the other plaintiff, and the remaining shares to the defendants.

His Honor, upon consideration of the complaint and answer, appointed three Commissioners to divide said lands into three equal parts, and having so divided them, shall allot to the plaintiff, Mary Ann Cromartie, one share thereof in severalty; and proceed to subdivide the next said one-third part into seven equal parts, and to allot to each of the other plaintiffs an equal share of said one-third part, to be held by each of them in severalty; and shall subdivide the remainiug one-third part into five equal parts, to be allotted to the defendants, to be held by each of them in severalty. From which ruling the defendants appealed.

Sutton, for plaintiffs.
W. McL. McKay, for defendants.

(384) RODMAN, J. The judgment of the Court below is supported by the decision of this Court in *Clement* v. *Cauble*, 2 Jones Eq., 82, where the precise question here made was discussed with great learning and ability, both by Judges Battle and Nash, who concurred in opinion, and by Judge Pearson, who dissented. We are now invited by the counsel for the appellants to review the principles of that decision and overrule them. We by no means wish it to be understood that if the question were an open one, we should not concur with the Court in that case.

But we think that the law, as it was then declared, is not now open to doubt or discussion. That decision was made in 1854. In 1859 the precise question was again brought before the Court in *Haynes* v. *Johnson*, 5 Jones Eq., 124, and the same principles were declared to be settled law by an unanimous Court; and the Court say, that as the Legislature in 1856 had in the Rev. Code, ch. 38, re-enacted the third rule in the canon of descents upon which the contention in *Cauble* v. *Clement* had turned, it must be taken to have given the legislative sanction to the interpretation put upon it in

that case. Since 1854 that interpretation has been a rule of property, and must have been acted on in many cases. Many estates must now be held under it. To change the rule now would cause great wrongs.

A decision of a Court of last resort which, from its nature, is a rule of property, especially after it had been acquiesced in and acted on for nearly twenty years, cannot be departed from without injustice, and its original merits are not open to inquiry.

There is no error in the judgment below. It is affirmed, and the action is remanded to the Superior Court of Bladen to be proceeded in according to law.

PER CURIAM. Judgment affirmed.

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(385)

HENRY C. WALL, *et al. v.* HENRY FAIRLY, *et al.*

In an action to recover the possession of realty, the Court has the power to allow the defendant to file a bond for costs, at the second Term after the answer has been filed; nor is it necessary that any of the defendants should sign such bond.

Russell v. *Saunders*, 3 Jones, 432; *McDowell* v. *Bradley*, 8 Iredell, 92; *Cohoon* v. *Morton*, 4 Jones, 256, cited and approved.

Motion for judgment by default, heard before Buxton, J., at Fall Term, 1871, of Richmond Superior Court.

The action is to recover a tract of land, and was returnable to Fall Term, 1870, of Richmond Superior Court, when the complaint and joint answer of the defendants were filed.

At Fall Term, 1871, when both sides having announced their readiness for trial, the plaintiffs moved for judgment on the ground that the answer of the defendants was a nullity, having been filed without their having first filed a bond for costs, or obtaining leave of the Court to answer without bond on certificate of counsel, and affidavit of inability, in compliance with the Act of Assembly.

The defendants asked the Court to allow a bond for costs to be filed instantly, on the ground that the omission had occurred through inadvertence, and was then for the first time brought to their notice. This motion was granted, to which plaintiffs excepted.

Only one of the defendants being present, the bond for costs was executed by him and two sureties who justified

their solvency before the Clerk in open Court. The bond was also signed in the name of the other defendants, by their Attorney, of record in the cause.

(386) The bond being accepted and filed, His Honor refused the motion made by the plaintiffs for judgment by default, from which ruling the plaintiffs appealed.

Moore & Gatling, for plaintiffs.
W. McL. McKay and *Thos. A. McNeill*, for defendants.

BOYDEN, J. The question raised in this case is too well settled to be considered open to debate.

In the case of *Russell* v. *Saunders*, 3 Jones, 432, Pearson, Judge, says: "We consider the point made in this case settled by *McDowell* v. *Bradley*, 8 Ired. Rep., 92. In that case the Court says, that although the proper bond was not taken at the proper time, yet the Court has the *power* to supply the omission, as was done with respect to *certiorari* bonds in the case of *Fox* v. *Steel*, 1 Cal. Law Rep., 370. There is no reason (says the Court) why prosecution bonds, appeal bonds, and *certiorari* bonds, should not be put upon the same footing; such has been the uniform practice and understanding of the profession." So in this case, as in the case of *Russell* v. *Saunders*, the Court thinks that the offer to give a good bond, when the objection was taken at the second term after the answer had been filed, was a full answer to the plaintiff's motion. But in this case the Court is further of opinion, that the Court below did not err in accepting the bond tentered; as it was signed by two solvent sureties, who had justified, and that it was not necessary that any one of the defendants should sign the bonds, as they were liable for the plaintiff's costs, in the event of his recovery, without signing the bond. *Cohoon* v. *Martin*, 4 Jones, 256.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

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(387) JOHN S. ANDREWS, Administrator of Elizabeth Andrews, dec'd, *v.* F. E. PRITCHETT *et al.*

In all actions under the C. C. P., where legal rights are involved, and issues of fact are joined by the pleadings, the plaintiff is entitled to a trial by jury; and cannot be deprived of this right, except by his consent.

Hatchell v. *Odom*, 2 D. & B., 302, cited and approved.

This was a civil action, tried before Clarke, Judge, at Fall Term, 1871, of Jones Superior Court.

The plaintiff, in his complaint alleged, that the defendants were indebted to his intestate in the sum of three hundred and ninety-one dollars, due by note.

The defendants, in their answer, denied the allegations of the plaintiff, and set up counter-claims against one Thomas Wilcox, the original payee of said note, and alleged that said former payee agreed to allow the counter-claims of debts against the note he then held against defendant.

At the trial term of the Court, when this cause was called, and before empanelling a jury, the defendant's counsel moved to non-suit the plaintiff, because the plaintiff did not show any assignment to plaintiff's intestate by the payee of the note, which was the subject-matter of the action.

The Court being of opinion with the defendant's counsel, ordered judgment of non-suit to be entered, from which the plaintiff appealed.

Battle & Sons, for plaintiff.
J. H. Haughton, for defendants.

DICK, J. This is an action for the recovery of money, and defendants filed their answer controverting the allegations of the plaintiff. Thus issues of fact were joined by the pleadings, and the plaintiff was entitled to have those (388) issues submitted to a jury. C. C. P., sec. 224.

If any of the causes of demurrer, specified in C. C. P., sec. 95, were apparent on the face of the complaint, the defendants might have demurred, and thus raised issues of law which would have been properly determined by His Honor.

It appears from the record that the issues of facts in the case were not submitted to a jury, but the "case coming on to be heard upon the pleadings, judgment of non-suit was entered against the plaintiff."

In this there war error, as the plaintiff's right to a trial by jury was absolute, and not denied by the Court. In most cases a judgment of non-suit can only be entered by the consent of plaintiff, and occurs when the plaintiff withdraws himself from the suit, and is not present in Court on a day when he is demandable, because he is satisfied that he cannot then support his case, or when he submits to a non-suit upon

the Judge intimating an opinion that the action is not maintainable. 2 Tidd., 869; 1 Saunders R., 195, note F; *Hatchell* v. *Odom*, 2 Dev. & B., 302.

The right of trial by jury is derived from the common law, and is guaranteed by the Constitution of the State. The former practice in courts of law upon this subject has not been materially changed by the C. C. P.

In all actions where legal rights are involved, and issues of fact are joined by the pleadings, the plaintiff is entitled to a trial by jury, and cannot be deprived of this right by the ruling of His Honor.

As the plaintiff in this case was deprived of this right by the ruling of His Honor, there must be a *venire de novo.*

PER CURIAM. *Venire de novo.*

(389) GEORGE W. WARD AND WIFE MARY ANN *v.* C. B. HASSELL *et al.*

A Clerk and Master who executed bonds as such in 1860, '64 and '66, and collected in May, 1862, a well secured note in Confederate currency, where he was directed only to collect the annual interest due thereon, and invested the proceeds in 7-30 Confederate bonds; *Held*, that the bond of defendant given in 1866 was not liable for the *laches* of defendant in May, 1862.

Debt brought upon the bond of the defendant Hassell, as Clerk and Master, tried before Moore, Judge, at Spring Term, of Martin Superior Court.

A demand was made by the plaintiff before the bringing of the suit, and the breach assigned was the failure to pay over the interest on the sum of one thousand dollars alleged to be due the plaintiff.

The facts are that one W. L. Mizell died in 1851, leaving a will, which was duly admitted to probate, in which he directed his estate to be equally divided amongst his brothers and sisters, limiting the interest of his sisters to an estate for life, remainder to their children. The *feme* plaintiff, one of the testator's sisters, inter-married with the plaintiff, Geo. W. Ward. After the executor of the will had paid off the debts of the estate, the same was by a decree of the Court of Equity, at Spring Term, 1855, ordered to be paid into that office, and to be invested upon good security, the interest to be annually collected and paid to the parties entitled thereto.

The principal sum due each party was declared to be $1,000. In lending the fund, the Clerk and Master was directed to prefer the parties entitled thereto.

At Fall Term, 1856, the Court ordered the Clerk and Master to lend the fund due the plaintiffs to the plaintiff George, upon his executing a bond with good sureties to repay the fund into the office upon the death of his wife, Mary Ann.

(390) During the year 1857, the plaintiff George executed his bond so conditioned, payable to the defendant, and received the funds.

Thereafter, 1859, the plaintiff George becoming embarrassed, executed a deed of trust to his sureties to the said bond. In November, 1859, the Master sold his property and took a bond from one H. W. Mizell for $1,000, payable to the defendant, with securities, who were solvent at the time, good during and through the war, and good at the trial, which the defendant accepted, and surrendered to the said trustees the plaintiff's bond.

The defendant collected the interest due on the Mizell bond for the years 1860–'61, and paid to the plaintiffs. On the 28th of May, 1862, he accepted payment of this bond in Confederate and Bank currency, which he was unable to lend out, and which he subsequently invested in 7-30 bonds, which he filed in his office and produced upon trial.

The defendant was appointed Clerk and Master at Fall Term, 1836, and renewed his bonds regularly at intervals of four years—in 1840, 1844, 1848, 1852, 1856, 1860, 1864 and 1866.

The suit was brought upon the bond given in 1866.

His Honor instructed the jury, that the defendants were liable for the interest accruing during the term of the defendant's last appointment, to-wit: that one for 1864, 1865 and 1866. Verdict for plaintiff.

Appeal.

H. A. Gilliam, for plaintiff.

Busbee & Busbee, and *W. N. H. Smith*, for defendants.

PEARSON, C. J. We are unable to see any ground upon which the ruling of His Honor can be sustained.

The action is on the bond of Hassell, as Clerk and Master in Equity, executed in 1866.

(391) The breach assigned is a failure to pay the interest upon a fund, which according to the special verdict had been in the year 1862, converted by Hassell into Confederate bonds. These bonds had prior to 1866, become entirely worthless. Hassell had filed them in his office, and produced them at the trial, so that in 1866 there was no fund, and as a matter of course his securities for that year are not chargable. Suppose some other person had been appointed Clerk and Master in 1866, would he and his securities have been liable for a fund which was lost before his appointment? The circumstance that Hassell was re-appointed does not alter the case at all, in respect to the bond of 1866.

Error.

PER CURIAM. Judgment reversed.

J. N. CLEGG, Executor of JAMES CLEGG, Deceased *v.* THE NEW YORK WHITE SOAPSTONE COMPANY.

1. Before this Court can vacate a judgment on the grounds of excusable neglect under C. C. P., sec. 133, it is the duty of the Judge of the Superior Court to find the facts as they should be set out in a special verdict.
2. In cases arising under the new system, issues of fact cannot be heard before this Court and it can only review the law which His Honor below applies to the facts as found by him.

Hudgins v. *White*, 65 N. C. 393, *Powell* v. *Weith*, at this Term, cited and approved.

Motion to set aside a judgment rendered in the Superior Court of Chatham County, heard before Tourgee, Judge, at fall term, 1871, of Chatham Superior Court.

The action was brought to fall term, 1870, of Randolph Superior Court, when the plaintiff filed his complaint, (392) and in the affidavit of the plaintiff's attorney he says he gave the defendant until 4th March, 1871, to file an answer to said complaint.

The attorney of defendant made affidavit that the defendant was a non-resident of the State, and that service of summons in the case was made by publication, and that he was retained by the regular attorneys of defendant, resident in this State, to procure a copy of the complaint, and furnish the same to said attorneys. That he did not furnish any copy to defendant's regular attorneys until the latter part of

April, 1871, when plaintiff's attorney gave affiant a copy, which was duly mailed.

The regular attorneys of defendant made affidavit that they had mistaken the time when Chatham Superior Court was held, and by reason thereof the answer of defendant had been delayed and was not filed in the case till the second week of the Spring Term, 1871, of Chatham Superior Court, when said Court had adjourned, having during the term rendered a judgment against defendant. They further declare that defendant had a meritorious defense, as they were informed.

His Honor, upon consideration, adjudged that the motion of defendant be denied and that he pay the costs, from which judgment the defendant appealed.

H. A London, for plaintiff.
No Counsel for defendant.

READE, J. In an application to a judge or to the Court below to vacate a judgment under C. C. P. Sec. 133, for excusable neglect, &c., it is the duty of the Judge: first, to find the facts, as they would be set out in a special verdict, and then to declare the law upon the facts. When this is done and there is an appeal to this Court, we take the finding of the facts by His Honor as conclusive; and we review his opinion and judgment as to the law. Because, whether a given state of facts constitutes excusable neglect, &c., (393) under the Code, is a question of law. But if His Honor does not find the facts and set them forth, how can we declare the law? Nor is it sufficient that His Honor should state the *testimony*, for, as in this case, that may be often conflicting, and we are incompetent to try the facts, but he must weigh the testimony and eliminate the facts, and set them forth.

In this case, His Honor set forth no facts, but has simply stated his conclusion of law.

It is, however, insisted that it ought to be presumed, that His Honor found such a state of facts, as would justify his conclusion of law. This would be the same as to say that His Honor could not err in his conclusion of law upon a given state of facts, and would make his judgment final. For, we repeat, how can we determine whether his law is

right, unless we know the facts? *Hudgins* v. *White, et al*, 63 N. C. R. 393, *Powell* v. *Weith*, at this term.

There is error. Let this be certified to the end that His Honor may find the facts, &c.

PER CURIAM. Error.

(394) A. W. MORGAN and A. L. SMITH *v.* L. C. HUBBARD and WARREN MOSELEY.

1. It is not competent for a co-debtor to offer in evidence, an entry in writing, of a payment of a debt, made by another co-debtor, who died prior to the institution of a suit, to recover the debt.
2. Such an entry is the simple declaration of the debtor that the claim was paid, which has neither the solemnity of an oath, nor the test of a cross-examination, whether objectionable also as made in the debtor interest, *quere.*

Bland v. *Warren*, 65 N. C., 372, cited and approved.

Appeal from a Justice's judgment, tried before Russell, Judge, at Spring Term 1871, of Sampson Superior Court.

The plaintiffs declared for goods sold and delivered to the defendants and one Robert Mosely, trading as Hubbard, Moseley & Co., during the year 1860, and in support of their claim they read in evidence the depositions of the plaintiffs as to the sale of the goods, that they had not been paid for, and also the order of the defendants for the property alleged to have been sold.

The answer of the defendants relied upon the plea that said account had been paid off and discharged.

In support of the latter defense, the defendants introduced the defendant L. C. Hubbard, who testified that the book offered in evidence belonged to their firm, in which was kept all the debts owing by them. That Robert Moseley, one of the firm generally attended to the settling the claims against the firm, and this book showed in the handwriting of said Moseley that this claim was paid off. That Moseley died in July 1855, and that prior to his death he had always kept the books in a correct, business-like manner. This evidence was objected to by the plaintiffs, but received by the Court. Verdict for defendant. Rule, &c. Judgment and appeal.

J. W. Hinsdale, for plaintiff.
No counsel for defendants.

READE, J. It not being controverted, that the goods (395) were furnished to the defendants by the plaintiffs, and the plaintiffs having testified under the solemnity of an oath, and under the test of a cross-examination, that the bill had not been paid, it would excite surprise that the jury should have found the bill paid, upon the simple declaration of the defendant, that he had paid, which declaration had neither the solemnity of an oath, nor the test of a cross-examination. And, surely the entry by the defendant in his book opposite the statement of the bill "paid," can have no other force or effect than a simple declaration of the defendant. It is conceded however, that we could not consider the mere weight of the evidence, that was for the jury. All that we can do is to say whether the simple declaration of the defendant, the entry in the book, "paid," was competent evidence for the consideration of the jury. It is well settled that it was not. First, because it was not under oath; second, because it had not the test of a cross-examination. It would be liable to the further objection that the entry was in interest of the party making it; but probably that need not be considered now, as a party is allowed to give evidence for himself, the only reason for mentioning it, is to distinguish it from the case where a third person, as clerk makes an entry in the regular course of business, and dies, the entry is evidence, not *proof* but *evidence*, for the consideration of the jury; this has been allowed from the necessity of the case, and because of the absence of any interest in the clerk to make a false entry.

And now it is insisted, that inasmuch as the entry of a deceased clerk is evidence, because there was no interest to affect it, and inasmuch as the interest of a party does not now exclude his testimony, the entry by a deceased party, ought to stand upon the same footing as the entry by a deceased clerk. But the answer is, that the statute has only made a party in interest competent to testify under oath, and a cross-examination, and does not go to the extent of allowing (396) simple declarations of the living, or written entries of the dead party. A like question was lately before us in *Bland* v. *Warren*, 65 N. C., 372.

There is error.

PER CURIAM. *Venire de novo.*

CHARLES WOODLEY *v.* W. E. BOND, Executor of A. W. Mebane, Deceased.

An overseer who contracts to carry on a farm for the owner at a fixed salary for the year, is entitled to recover for the value of his services, where he quits his employer before the expiration of the year, because this employer sells out the plantation, stock and crop, and directs the overseer to remain and carry out the contract with the purchaser of of the plantation.

Civil action tried before Pool, Judge, at Fall Term, 1871, of Chowan Superior Court.

It was in evidence that the defendant's testator hired the plaintiff as overseer of his plantation, in Bertie County, for the year of 1870, for the sum of $625. On the 28th of July, 1870, the defendant's testator sold the plantation, crop and stock to Augustus Holley; that it was at the time of said sale agreed between Holley and the defendant's testator, that the plaintiff was to remain through the year upon the same terms, to occupy the same position; and by Holley that the sale was not intended to interfere in any way with the contract between him and the defendant's testator.

After the sale to Holley, the defendant's testator wrote to the plaintiff a letter reciting the above facts, which was received by the plaintiff on the 29th of July, 1870; that he declined to act upon this letter, and refused to let Mr. Holley have possession, saying that he would see Mr. Mebane (the defendant's testator) and find out what he meant.

On the 3d of August, 1870, the plaintiff saw the de-
(397) fendant's testator, and demanded the full contract price for his services for the year, and being refused, he left the plantation.

The defendants counsel asked the Court to charge the jury, that there was no evidence that defendant's testator had discharged the plaintiff from his service; that the sale to Holley during the year, under the circumstances, did not justify the plaintiff in abandoning the contract, and having done so, he was not entitled to recover at all.

His Honor charged the jury that there was no evidence that defendant's testator had discharged the plaintiff, and that upon the sale being made during the year, the plaintiff had the right to put an end to the contract, and having done so, he was entitled to recover for the time he had served that proportion of the amount stipulated for the service for the year.

Defendant excepted. Verdict, rule, &c. Judgment and appeal.

No counsel for plaintiff.
Gilliam, for defendants.

DICK, J. The plaintiff contracted to serve the testator of the defendant as an overseer on a farm for one year. Before the term of service had expired, the said testator, without the knowledge or consent of plaintiff, sold and delivered possession of said farm to Augustus Holley, and left the farm a few days after the sale.

The agreement between the plaintiff and testator was a personal contract, and its benefits and obligations did not in any respect pass with the land to Holley. Various considerations, besides the wages agreed upon, may have induced the plaintiff not to enter into the contract. It may be that he would not served Holley at any price. The contract consisted of mutual engagements between the parties, which established the relation of employer and overseer, and (398) as this relation was ended by the action of the testator, the plaintiff was at liberty to regard the contract as rescinded, leave the farm, and bring suit upon a *quantum meruit* for services rendered at the instance and request of testator.

2 Parsons on Cont., 32, 523, 678; *Robeson* v. *Drummond*, 2 B. & Ad., 303; *Planche* v. *Colborn*, 8 Bing., 14; 2 Smith L. E., 18, 19; (notes on *Cutler* v. *Powell.*)

The principles involved in this case are so well founded in natural justice, that they need no further discussion or citation of authority.

There is no error.

PER CURIAM. Judgment affirmed.

JOSEPH MERWIN *v.* JOSEPH L. BALLARD.

1. A statute is to be construed prospectively unless contrary intention be clearly expressed therein. Therefore, where an action was commenced on the 18th day of March, 1870, and subsequently the Legislature passed an act changing the mode of procedure, it can have no application to such cause, and the action must be tried according to the law existing at the commencement of said action.

2. When an action under the old system was brought for goods sold and delivered to the defendant, and he demurs thereto, if the Court over-

rules the demurrer, it would be irregular to grant a final judgment, but such judgment must be only interlocutory, and the inquisition of a jury is necessary to ascertain the value of the goods so sold after having the proofs of both parties to the action.

Parker & Gatling v, *Smith*, 64 N. C., 291; *Hamlet* v, *Taylor*, 5 Jones, 36, cited and approved.

Petition to rehear this case, which was decided at January Term, 1871, and reported in 65 N. C., 168.

The facts upon which the petition is based are found (399) in the opinion of the Court in the volume referred to. Petition was filed at January Term, 1871.

Moore & Gatling, for petitioner.
Battle & Sons, contra.

DICK, J. The various changes made in the C. C. P. by the Legislature have tended to produce some confusion in pleading and procedure in the Courts, and have given rise to many questions as to the proper construction of these amendatory statutes.

The act ratified on the 28th day of March, 1870, chap. 205, was not called to our attention when this case was argued at a previous Term, (65 N. C. R., 168,) but it does not affect that decision. The act, in express terms, is declared to be in force from and after its ratification, and it had no operation previous to the date. *Hamlet* v. *Taylor*, 5 Jones, 36.

This action was commenced on the 18th day of March, 1870,—ten days before the ratification of said act—and was brought in accordance with existing law as set forth in the opinion heretofore filed in the case. The subsequent statute did not deprive the plaintiff of his rights. A statute, upon obvious principles of convenience and justice, must in general be construed as prospective in its operation. It must be construed as intended to regulate the future conduct and rights of persons, and not to apply to past transactions. This elementary rule of construction may be changed by the Legislature, but such intention must be sufficiently expressed by the statute. As no contrary intention is manifested in the act which we are considering, the general rule must prevail, that the law as it existed when this action was brought must decide the rights of the parties litigant. *Hitchcock* v. *Way*, 6 Ad. and L., 249.

Under the old rules of pleading, by which this case was governed there was no error in overruling the demurrer

(400) and entering judgment for the plaintiff. The expression "final judgment," used in the former opinion, must be understood as distinguishing it from a judgment of *respondeat ouster*. The absolute judgment entered for the plaintiff is irregular as it was taken contrary to the course and practice of the Courts, and it must be set aside, although it is not complained of by the defendant in his assignment of errors.

This action is upon an open account and sounds in damages; and the judgment upon demurrer, like a judgment by default in such cases, can only be interlocutory, and the amount of damages must be ascertained by a jury upon a writ of enquiry. 1 Saunders R., 109, note 1; Tidd, 568, 740. Upon this inquisition the plaintiff is only entitled to such damages as the jury may assess after hearing the proofs of both parties to the action. *Parker & Gatling* v. *Smith*, 64 N. C., 291.

The irregular judgment in this case must be set aside and an interlocutory judgment entered, and then the case is remanded to the Court below, that a writ of enquiry may be issued to ascertain the damages to which the plaintiff is entitled.

As this is only a modification of the previous judgment, neither party is entitled to costs.

PER CURIAM. Judgment set aside and case remanded.

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(401) W. H. POWELL *v.* BENJAMIN SMITH.

Where a promissory note was given by A as principal and B as surety, the consideration of which was the hiring of a substitute in the Confederate States army, and afterwards the surety, at the request of the principal, paid off said note at its value, and the principal gave his note to the surety for the amount paid: *Held*, that the last contract was a new and independent one, founded upon the consideration of money paid at the request of the principal, and that it was not affected by the illegality of the original note, nor by any knowledge which the surety may have had of that fact.

This was a civil action, tried before Watts, Judge, at Fall Term, 1871, of Franklin Superior Court.

The jury found a special verdict in these words:

"That on the 10th day of October, 1862, the defendant, Smith, with one W. H. Davis, as surety, executed a note under seal, to G. W. Blacknall, for $1,500. The consideration

of the note was the hiring of a substitute to take the place of the said Smith in the army of the Confederate States, on the 25th of April, 1863. Smith paid on said note $500, afterwards the note was endorsed by Blacknall to one Burwell. By agreement between the principal of the note and the surety, Davis, he (Davis) paid to Burwell, the holder, $504 on the 21st July, 1866, which Burwell accepted in full discharge of the note and surrendered the note to Davis, thereupon Smith gave his note to Davis for $504, and took up the original note. Davis transferred the note in suit without endorsement to W. H. Powell, who had notice of the consideration. Credits had been entered on the note as payments by Smith at different times. The excess over $200 had been remitted at the time of bringing the suit before a Justice of the Peace. That there is now due on said note the sum of $200, with interest from February 3d, 1871."

(402) Upon the special verdict, His Honor was of opinion that plaintiff was not entited to recover. A verdict was entered for the defendant. Judgment for costs. Plaintiff appealed to the Supreme Court.

Jones & Jones, for plaintiff.
A. M. Lewis and *C. M. Busbee*, for defendants.

DICK, J. The jury wnd in their special verdict that a note for money which was used in hiring a substitute in the Confederate army; was executed by defendant and Davis as surety, to Blacknall, who assigned the same to Burwell. Several years afterwards this note was paid off at its scaled value by the surety, Davis, at the request of his principal, Smith; and the note, which is the subject of this action, was executed by Smith to Davis, who assigned the same to the plaintiff.

This is a new and independent contract, founded upon the consideration of money paid at the request of the defendant by Davis, and his knowledge of the illegality of the original bond does not vitiate this new transaction. Questions of this character have been the subject of much discussion and some conflict in the English Courts, and some of the leading cases were ably and elaborately reviewed by Chief Justice Marshall in the case of *Armstrong* v. *Toler*, 11 Wheaton, 258, and the principle governing their case is distinctly enunciated.

"The proposition stated by Lord Mansfield, in *Faikney* v.

Reynous, that if one person pay the debts of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the Court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case. A subsequent express promise is, undoubtedly, equivalent to a previous request."

There was error in the ruling of his Honor, and (403) there must be judgment in this Court for the plaintiff on the special verdict.

PER CURIAM. Judgment reversed.

EMILY MOYE *v.* DANIEL COGDELL and another.

1. Pending a motion to set aside an execution, and cause satisfaction of judgment upon which it was based to be entered upon a record, a Judge of the Superior Court, can, in the exercise of sound discretion, submit such issues of fact to a jury, arising on conflict of testimony, as he may deem proper, and this Court will not attempt to control its exercise.
2. Under our present system, Courts of law and equity have been blended.
3. When a Judge of the Supreme Court has power to pass upon questions of fact, in the administration of justice, and he becomes perplexed by a conflict of testimony, he may and should enlighten his conscience by referring their solution to the determination of a jury, and in the meantime to cause the execution to be superseded.
4. A jury is the appropriate tribunal to determine matters of fact rendered doubtful by contradictory evidence.
5. A Judge may refer all questions of fact, which he can lawfully determine to the decision of a jury.

The cases of *Freeman* v. *Bibb*, 65 N. C. R., 128, and *Redman* v. *Redman*, 65 N. C. R., 546, cited and approved.

This was a motion made in the Superior Court of Wayne County, on notice by the defendants to set aside an execution and have satisfaction of the judgment entered of record, many affidavits exhibiting great conflict of testimony, were submitted to His Honor, Judge Clarke.

(404) His Honor ordered issues arising on the conflicting evidence to be submitted to a jury, and a supersedeas to issue in the meantime until a new trial could be had.

From this order of His Honor, the plaintiffs appealed to this Court. The transcript is so confused an unintelligible,

that but for the assistance of His Honor, who delivers the opinion, no report could be made.

Battle & Sons, for appellant.
Faircloth, Bragg & Strong, for appellee.

DICK, J. There is great confusion, and a number of unneccessary papers in this transcript; and we have found much difficulty in understanding the case, but for the explanations of counsel.

The plaintiff obtained a judgment against the defendants, and had an execution issued thereon. The defendants made a motion in the cause, founded upon affidavits, to have the execution set aside, and a satisfaction entered upon the record. His Honor, after hearing affidavits on both sides, was not satisfied as to the facts in the case, and ordered "that the execution be superseded, and that proper issues of facts be made up, to be submitted to a jury," etc. The defendants adopted the proper course of procedure, and the Judge had the right to supersede the execution, and determine the matters of fact involved in the controversy. *Foreman* v. *Bibb*, 65 N. C. R., 128.

The only material question presented to us in the argument of counsel, is whether the Judge had a right to direct issues of fact to be referred to a jury?

Under the present system, Courts of Law and Courts of Equity have been blended, and both legal and equitable remedies are now enforced and administered in the Superior Court. The Judge of such Court is invested with most of the power formerly exercised by a chancellor.

When he has the power to pass upon questions of fact in the administration of justice, and he is perplexed by (405) a conflict of testimony, he may, and he should enlighten and satisfy his conscience by referring them to a jury, which is the appropriate tribunal to determine matters of fact rendered doubtful by contradictory evidence. *Redman* v. *Redman*, 65 N. C. R., 546.

Under the C. C. P., the parties to an action may agree to submit *issues of fact* joined by the pleading to the decision of the Court, and the Judge may refer all questions of fact which he can lawfully determine to the decision of a jury, when a doubt arises in his mind from a conflict of testimony.

We cannot interfere with the ruling of His Honor, and

we are satisfied that the order complained of was made in the exercise of a wise discretion.

There is no error.

PER CURIAM. Judgment affirmed.

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(406) DOE on the demise of AMELIA KIRKMAN *v.* JAMES H. DIXON *et al.*

1. A judgment appealed from must be affirmed in this Court, no error being assigned on the record, in cases where the statement as prepared by the appellant has been returned with objections and the appellant had failed to apply to the Judge below, to give the parties a day to settle the case as prescribed by sec. 301, C. C. P.
2. In such case, upon proper affidavit, an order will be made to the Judge to certify a statement, but if the Judge returns to such order that no application to settle the case had been made, the appellant is without remedy.
3. Whether relief in such case is obtainable under section 133, Code Civil Procedure, *quere.*

This was an appeal from a judgment rendered herein by His Honor, Judge Watts, at Spring Term, 1871, of Craven Superior Court.

In this Court a motion was made by the defendant's counsel to dismiss the appeal, based on affidavit that the case appearing in the transcript, which is *only* signed by the counsel for appellant, was returned by him to plaintiff with his specific amendments attached thereto.

Thereupon a notice was ordered to issue to Judge Watts, to show cause why a mandamus should not issue to him to compel him to forward the statement of the case.

To this Judge Watts responds, that no application was ever made to him to settle the case, etc.

The motion to dismiss being renewed at the present term on the calling of the cause, and nothing more appearing, the following opinion is delivered by the Court.

J. H. Haughton and *Battle & Sons*, for the appellant.
George Green, for the motion.

READE, J. When the plaintiff appealed it was her (407) duty to prepare a concise statement of the case, etc., and have the same served on the respondent.

What was intended to be such statement was prepared by the plaintiff, and was returned by respondent with his ob-

jections. It then became the duty of the plaintiff to apply to the Judge to give the parties a day before him to settle the case. C. C P., 301. This, it seems, was not done by the plaintiff.

The case, therefore, being before us simply upon the record, and no assignment of errors, all that we can do is to affirm the judgment.

Upon affidavit and motion of plaintiff at June Term of this Court, an order was made that the Judge below certify a statement of the case, or show cause a mandamus should not issue.

The Judge shows cause that no application had been made to him as required by C. C. P., 301. And of course there is no ground for a mandamus.

Whether the C. C. P., 133, allows of any relief for the plaintiff, by motion below, to have the judgment vacated, upon the ground of mistake, surprise, inadvertence, or excusable neglect, and to have leave to amend the proceedings so as to make them conform to the provisions of the Code, is not now for consideration.

There is no error. Affirmed.

PER CURIAM. Judgment affirmed.

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(408) JOHN WILSON *v.* THOMAS D. HOLLEY.

1. Where the defendant gave a receipt to the plaintiff for all the fishing materials, and "apparatus owned by W. & H.," it is competent for plaintiff to show that defendant represented that all of said seine, etc., was at a particular place, as such evidence tends to show where plaintiff was to receive the articles purchased.
2. Where the complaint alleges no fraudulent representation in the sale of personalty, it is not proper to charge the jury that plaintiff is not rntitled to recover for a fraudulent representation, as there is no such issue raised by the pleadings.
3. It is not error to refuse any instructions asked upon an unhypothetical state of facts.
4. Where the defendants contracted to sell to the plaintiff all the fishing materials belonging to them as a firm, and removed a part thereof, the plaintiff is entitled to recover the value of the part thus removed, whether the removal took place before or after the sale.

Civil action tried before Pool, Judge, at Spring Term, 1871, of Bertie Superior Court.

It was proved that the plaintiff and defendant were, in 1868, partners in fishing, under the name of Wilson & Holley,

and as such owned a seine, rope, cork, etc., and all the outfit of a river fishery, and had fished in the spring of said year at Eaton House Fishery on the Chowan river. At the expiration of the fishing season of said year, the seine, rope, etc., were stored in a house on the beach of said fishery after the usual drying process. The plaintiff lived twelve miles from the said fishery, whilst the defendant lived less than two miles therefrom, and was the active partner of the firm.

On the 27th day of October, 1868, in consideration of $800, cash then paid by the plaintiff to the defendant, the latter sold to him all the defendant's share and interest in and to said seine, etc., when the defendants gave to
(409) plaintiff a receipt "in full for all the fishing materials and aparatus owned by Wilson & Holley."

The plaintiff testified that at the time of said sale, the defendants represented that all of said seine, &c., was at the Eaton House fishery.

The defendant testified that he made no such representation.

The plaintiff further testified that he took possession of the seine, &c., in November 1868, but made no personal examination thereof, until February, 1869, when he discovered that 1,000 yard or more of the seine, much of the rope, and a portion of the corks were gone.

On the day of the discovery plaintiff met the defendant and informed him of his loss, whereupon the defendant made a calculation and said that there ought to be ------ yards which was right; but the defendant said nothing about his having carried some of it to Mount Gold, his residence.

One Slaughter testified that during the later part of October or first of November, 1868, he saw the defendant, with a wagon and team and a driver at the Eaton House fishery. Late in the evening of the same day, he saw the same wagon, team and driver going from the direction of the Eaton House fishery, towards the home of defendant, and that he saw on the wagon something he thought to be seine and rope.

There was evidence tending to show that the lost material was worth at least three hundred dollars. It was also in evidence that the forty yards of seine, which the defendant admitted that he used, was of much less value, and that the 200, yards of seine, which he admitted he carried to his residence, was of less value than three hundred dollars.

The defendant testified that he had carried to his house 200

yards of old seine, 60 yards of rope, and about 50 corks, which he intended to convert into a hand seine, but had failed to do so; that the same had been used for three
(410) seasons, and was unfit for a large river seine; that in March, 1869, he carried the same back to Eaton House fishery, and used during the fishing season of 1869 about 40 yards thereof; and that the balance has been at said fishery ever since April, 1869, subject to the order of the plaintiff, who has not demanded any part thereof; that the materials carried away by him were not worth more than the amount tendered.

The defendant excepted to the admisibility of the evidence on behalf of the plaintiff, that at the time of the sale the defendant represented all of the seine, &c., to be at the Eaton House fishery.

The defendant requested His Honor to charge the jury:

1st. That plaintiff can recover only for the conversion of said seine and rope, but not for any alleged fraud, or fraudulent representation of said seine or rope.

2d. If the jury believe from the evidence, that the defendant removed a portion of the seine and rope from the Eaton House fishery before the date of the contract of sale to the plaintiff, and has on hand now all of said seine and rope except 40 yards of seine, subject to the demand of the plaintiff, then he can recover only the value of the 40 yards of seine.

Both of these instructions were refused by His Honor, who charged the jury:

1st. That if the defendant removed the seine, rope, &c., after the sale, the plaintiff's right to recover was conceded.

2d. If the defendant removed any part of the seine, rope, &c., beyond the reach of the plaintiff, and thus failed to deliver all which he purported to sell, the plaintiff should recover the value of that part thus removed, whether the removal took place before or after the sale.

Verdict for plaintiff for $300. Rule &c., judgment and appeal.

H. A. Gilliam and *Busbee & Busbee*, for plaintiff.
Barnes, John A. Moore and *W. N. H. Smith*, for defendant.

READE, J. 1. We see no force in the objection of
(411) defendant to the admission of evidence to show that at the time of the sale he represented to the plaintiff

that all the seine, &c., sold was at the Eaton House Fishery. It was evidence to show that was the understanding of the parties, that the plaintiff was to receive the articles at that place, and to show the obligation on the part of the defendant to deliver them at that place, if he had them in his possession at another place.

2. The defendant was not entitled to the instruction prayed for, "that the plaintiff was not entitled to recover for any fraud or fraudulent representation of the defendant," for the reason that there was no claim or demand on the part of the plaintiff to recover upon such grounds, but only for the value of the seine, &c.

3. The defendant was not enttiled to the instruction prayed for, "that if he, the defendant, had the seine, &c., from the Eaton House Fishery, before the sale to plaintiff, and has on hand the same subject to plaintiff's demand, the plaintiff is not entitled to recover." Because such instruction would have negatived the idea that the defendant had represented the goods to be at the Eaton House Fishery, and that it was his duty to deliver them there, and would have assumed the fact, which does not appear, that the defendant had disclosed to the plaintiff that the goods were not at the Eaton House Fishery, but were in the defendant's possession subject to the plaintiff's order.

The defendant's exceptions to the evidence being without force, and not being entitled to the instructions which he prayed for and the instructions given, appearing to us to have left the case fairly with the jury.

There is no error.

PER CURIAM. Judgment affirmed.

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(412) SAMUEL WEBER and wife *v.* BENJAMIN TAYLOR *et al.*

This Court has no power to order a *certiorari* without requiring bond and security thereon.

This was an application made to this Court for a *certiorari* without giving bond and security, upon affidavit of insolvency, and certificate of counsel of merits. An order *nisi* was made and notice to the defendants, and this counsel was given, and was argued at the present term.

Isler, for the petioner.

1. It is discretionary with the Court whether any pauper can sue in it.

2. Acts 1868–'69, p. 220, prescribe that *any* Judge, &c., may authorize any person to sue in *forma pauperis.*

Battle & sons, contra.

PEARSON, C. J. The only question presented is as to the power of this Court to grant a writ of *certiorari* in the nature of an appeal, without requiring bond and security as in case of appeal, upon the petitioners filing an affidavit, such as would be required in the Superior Court, to support an order for leave to sue in *forma pauperis.*

"To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant by at least two securities," &c. This takes away the right of appeal without security, and we are forced to apply it to a *certiorari*, which is to answer for the purpose of an appeal. C. C. P., sec. 303.

If permitted to speculate upon the reason for not allowing an appeal in *forma pauperis*, it might be suggested that it was supposed that the judgment of a Superior Court raised
(413) so strong a presumption against the party that it was not right to allow the litigation to be proceeded in further, unless the costs of the other party and of the officers of the Court were secured.

Certiorari refused.

PER CURIAM. Rule discharged.

EDWARD C. TURNER *v.* GILBERT A. LOWE.

1. The principle that a tenant cannot dispute his landlord's title is in full force, but a tenant was never prevented from showing an equitable title in himself, or any facts which would make it inequitable to use his legal estate to deprive him of the possession.
2. For this purpose, formerly, the tenant was driven into equity, but under the present system the tenant in such cases can avail himself of such equitable defence by his answer.
3. If such a defence cannot be set up in a Superior Court, it cannot be anywhere, as we have no separate Courts of Equity.

The case of *Calloway* v. *Hamby*, 65 N. C. R., 631, cited and approved.

This was a civil action, brought to recover the possession of land, tried before His Honor, Judge Cloud, and a jury, at Spring Term, 1871, of Surry Superior Court.

The plaintiff claimed as landlord, &c. The defendant admitted the alleged tenancy, but in his answer set up as a counter-claim various facts, which he claimed constituted an equitable defence to the action, and proposed to give evidence thereof on the trial. His Honor rejected the evidence, and a verdict was, under the instructions of His Honor, found for the plaintiff, and from the judgment rendered thereon the defendant appealed.

It is deemed unnecessary to set forth the particulars (414) of the proposed equity, as the case in this Court is made to turn upon the right of the defendant to set up an equitable defence; this Court assuming that His Honor intended to reject all evidence intending to support an equitable defence.

Masten, for plaintiff.
No counsel for defendant.

RODMAN, J. The rule that a tenant cannot dispute his landlord's title, has not been impaired by any recent legislation or by any recent decision of this Court. It holds good now wherever it formerly did.

But a tenant might always show an equitable title in himself against the legal title of his landlord, or any facts which made it inequitable in the landlord to use his legal estate to turn him out of possession.

When law and equity were administered by distinct tribunals, the tenant was obliged to go into a Court of Equity for that purpose. But now that they are administered by the same Court, and without any distinction of form, the tenant can set up in his answer any equitable defence he may have to his landlord's claim. *Calloway* v. *Hamby*, 65 N. C. R., 631, is a case in which that was successfully done, and the defendants were held entitled to a specific performance of the plaintiff's covenant to convey the land. If such a defence cannot be set up in a Superior Court, it cannot anywhere, for we have no separate Court of Equity.

We have not been at liberty to consider the particular equity set up in this case. The Judge refused to hear it on the ground that no equity would avail as a defence. In this this he erred.

Judgment reversed and the case remanded.

PER CURIAM.

(415) G. W. REID and JACOB ALLEN *v.* WILLIAM SPOON *et al.*

1. It is well settled that a judgment, rendered according to the course of the Court, cannot be collaterally impeached.
2. Judgments of Justices' Court, regularly docketed upon the judgment docket of the Superior Court, form no exception to the principle above stated.

This was a civil action brought to recover the possession of land, tried before His Honor, Judge Tourgee, at Spring Term, 1871, of Randolph Superior Court.

Several points were made on the trial, but as the case is made to turn on one only, it is deemed unnecessary to state them.

The plaintiffs on the trial, in support of their title, offered in evidence the record of the judgment docket of the Superior Court, containing the transcript of a judgment of a Justice of the Peace, against the defendant, William Spoon, that an execution had duly issued thereon, and thereunder the land had been sold and purchased by the plaintiff.

The defendants objected to this evidence, on the ground that it appeared from the original papers in the case before the Justice, which had been theretofore offered in evidence and rejected, that the action was not brought in the name of the real party in interest, and that the judgment docket contained a mere copy of the Justices' judgment.

This objection was sustained by His Honor, and the evidence excluded.

There was verdict and judgment for the defendants, and the plaintiffs appealed.

Scott & Scott, for defendants.
Mendenhall & Staples, for plaintiff.

(416) BOYDEN, J. It has repeatedly been decided by this Court, that a judgment rendered according to the course of the Court cannot be collaterally impeached. The plaintiffs showed a regular judgment taken before a Justice of the Peace, that the same, or a transcript thereof, had been entered on the judgment docket of the Superior Court. A regular execution thereon issued, and a sale and Sheriff's deed. This constituted a part of plaintiff's alleged chain of title, but His Honor rejected this evidence on the ground that the true party in interest, in the note sued upon before the Justice, was not made a party plaintiff. Suppose this to

be so, and the defendant might have defeated the recovery before the Magistrate by taking that objection? What difference can that make in this case? The judgment binds the party against whom it was given, until it is reversed, and cannot be impeached in this collateral way; the authorities cited by plaintiff's counsel fully establish that position.

There is error. This will be certified.

PER CURIAM. Judgment affirmed.

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(417) JAMES TOMS *v.* HENRY WARSON.

1. Under the provisions of the C. C. P., an attachment is not the foundation of an independent action, but is a proceeding in the cause, in the same action already commenced, is an anciliary remedy and collateral to such an action.
2. Hence a stranger to the action in aid of which the attachment is issued, has no right to intervene, and make himself party thereto, though upon proof of interest in the property attached, he may be allowed to make up a collateral issue of title.

This was a petition filed by Crawford and Murray in the above named cause, and heard before His Honor, Judge Henry, at Fall Term, 1871, of Buncombe Superior Court.

Toms had brought suit against Warson on notes, and while the same was pending, Toms sued out an attachment and caused the same to be levied on certain land claimed by Crawford and Murray.

Therefore Crawford and Murray filed their petition to be allowed to intervene in the original action, and contest the plaintiff's right to recover against Warson on the notes. His Honor declined to grant the demand of the petition, and from this determination Crawford appealed.

M. Erwin, for appellant.
D. Coleman and *J. H Merrimon*, for appellee.

RODMAN, J. In January, 1869, the plaintiff commenced an action in Buncombe Superior Court against defendant upon two notes. Afterwards, while the action was pending, and undetermined, the plaintiff applied to the clerk of that Court upon affidavit for an attachment, which was issued, and returned levied on certain lands in Henderson County, and also on certain lands in Buncombe County. On the re-

turn of the attachments, the defendant put in an answer, denying that he was the owner of the property attached, (418) &c., and the clerk thereupon returned all the papers connected with the attachments to the Superior Court in term time for the trial of the issues thus irregularly joined between the plaintiff and defendant.

Crawford and Murray appeared before the Judge, the former claiming the lands levied on in Henderson, and the latter those in Buncombe, and they moved the Judge to allow them to become parties to the original action on the note. This he refused, but allowed them to become parties to the collateral issues respecting the title to the property levied. From this refusal they appealed.

1. The summons and complaint by the plaintiff as a ground for his motion for the attachment were unnecessary. The motion for an attachment is a motion in the original action. It must be founded on a proper affidavit, and should be in writing. The defendant may oppose the granting of the attachment in the first instance, if he has notice of the application, or he may come in afterwards and move to vacate it, either in defects in the plaintiff's case, or on counter affidavits, as the nature of the case may require. But he cannot plead to the attachment in a technical sense. To do so was irregular.

Crawford and Murray might have appeared before the clerk and moved there to be allowed to be made parties, when they could have set up their title to the property. When issues of fact were thus joined, the clerk should have sent them up to the Judge of the Superior Court to be tried there.

2. But as this was not done, and the clerk had sent up the issues between the plaintiff and defendant, arising out of the attachment, and they were then pending before the Judge, Crawford and Murray might well apply to him to become parties to that collateral issue, for the purpose of asserting their respective claims to the property. This the Judge offered to allow them to do

3. But they had no right to become parties to the original action on the note. In the matters at issue in that (419) action, they had no interest to be affected by any judgment which might be given. There was no reason for their intervening. They were strangers to that controversy, and could neither be benefitted or prejudiced by its result. The Judge properly refused to allow them to become parties.

If they had so moved, the Judge might have made an order suspending the sale of the property attached until after the determination of the collateral issues respecting the title, and no doubt he would have done so, but whether he had or not, all purchasers of the land in Buncombe, would have been affected by notice of the claim to that, and Crawford, by filing a notice of *lis pendens* in Henderson County, as provided by sec. 90, C. C. P., could have affected with all purchasers of the property in that County.

There is no error. Let this opinion be certified to the Superior Court of Buncombe, to the end that it may proceed in the action according to law.

PER CURIAM. No error.

(420) J. B. LEGGETT *v.* THE HEIRS-AT-LAW OF BENJAMIN LEGGETT.

It is erroneous for a Superior Court to pronounce any judgment, if the facts are controverted, until the same have been ascertained in some of the modes provided for.

This was an appeal from the Superior Court of Martin.

One Biggs. a creditor of the plaintiff's intestate, moved in the above entitled cause, which was a petition to make real estate assets, on notice to set aside a sale of the real estate on certain grounds.

This motion was supported by affidavits, and the facts constituting the basis of Biggs' motion were controverted by counter-affidavits, filed on behalf of the plaintiff.

The Court, without proceeding first, in any way, to ascertain the facts, made an order setting aside the rule, and the plaintiff appealed.

Smith, for the appellant.
No Counsel, for the appellee.

RODMAN, J. There is no finding of any facts in this case upon which this Court can act, and so far as we can see, the controversy is altogether one of fact. Biggs, creditor of Benjamin Leggett alleges that John B. Leggett, executor of said Benjamin, was authorized by the County Court of Martin, to sell certain lands of his intestate, that he reported a sale to his brothers, Joseph and William, and was about to make a title to them without the payment of the price, he and they being insolvent.

The executor and the purchasers deny this, and they say they purchased fairly and have paid the full price.

The Judge without either finding himself that they had not paid, or submitting issues to a jury in order that
(421) the disputed facts might be proved, orders the purchasers to pay the money into Court, and in their default, that the land be again sold.

Clearly this order should not have been until the facts in controversy had been ascertained in some way.

Judgment reversed and case remanded to be proceeded in according to law. Let this opinion be certified.

PER CURIAM. Judgment reversed.

MARY LENTILE *v.* W. W. HART.

Although issues, in old equity suits pending in this Court, have been settled and ordered here, if after a verdict on them, this Court on a careful examination of the whole case discovers that the full merits of the controversy cannot be determined in the issues as found, it will order any other issues it deems necessary to a complete determination.*

This was a suit in equity removed to this Court under the former practice, and in which after the adoption of the Constitution, issues were ordered to try disputed facts.

The plaintiff alleged in her bill (amongst other matters) that the defendant had procured from her by fraud and deceitful practices a bond for title to two lots in Charlotte, and afterwards that she, while bordering on mental alienation, had agreed, if defendant would rescind that trade, she would make him a deed absolutely for one of the lots.

She alleges that the deed, made by her in pursuance of this agreement, was executed when she was incapable from various reasons to make a legal contract, and prays a rescission of the transaction.

(422) The issues which were tried, were framed with reference to the mental capacity, undue influence, &c., at the time of the execution of the deed.

The finding on the issues having been certified to the present term, they were argued by—

*NOTE.—The Reporter thinks it unnecessary to have the issue suggested by the Court published in the Reports. Copies have been sent to the Court below.

J. H. Wilson and *H. W. Guyon*, for plaintiff.
Vance & Dowd (with whom was *Bailey*), for defendants.

RODMAN, J. The issues upon which the jury passed were too narrow. As the bill seeks also to set aside the bond she gave to make a title to Hart, they should have embraced her state of mind at the execution of that instrument; and also whether any improper means were used to induce its execution, and the value of the property agreed to be conveyed. Without disturbing the finding of the jury on the issues heretofore submitted, the court directs that the following issues be submitted to a jury in the Superior Court in Mecklenburg. The attorneys for the parties may add any others which they think material and can agree on.

PER CURIAM. Cause remanded.

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(423) SYDNEY A. POWELL *v.* J. M. WEITH.

1. On a motion made to vacate a judgment under the 133d section, C. C. P., it is the duty of the Judge to find and state the facts, in order that his decision thereon may be revised by this Court.
2. In such case, where one of the grounds was, that the action (which was commenced under the old system) had not been transferred in due time, a statement of the Judge that "the action was transferred within the time prescribed by law," is not a sufficient finding of the facts, but he should have stated when the suit was transferred.

The cases of *Clegg* v. *N. Y. White Soapstone Co.*, at this Term, and *Hudgins* v. *White*, 65 N. C. R., 398, cited and approved.

This was a motion to vacate a judgment under sec. 133, C. C. P., heard before His Honor, Judge Tourgee, but at what time does not appear in the transcript, except that it was within one year after the rendition of the judgment.

Among various grounds assigned for the motion, it was alleged by the defendant, that the action was commenced in 1853, and was not transferred within the time prescribed by law.

His Honor was requested to find the facts upon this and other grounds. As the opinion is based upon the action of His Honor, touching this ground alone, it is deemed proper to confine the report to the matters connected with it.

His Honor, on this point, professing to find the facts, states that "the action was transferred within the time prescribed by law and no further notice was necessary."

His Honor declined to grant the motion, and the defendants appealed.

Dillard & Gilmer and *Scott & Scott*, for the appellant.
Mendenhall & Scales, for the appellee.

(424) READE, J. The conclusion of His Honor's ruling is as follows:

"Upon these facts, the Court holds that the defendant is not entitled to have the judgment set aside for surprise or excusable negligence. The motion is therefore denied."

From this it is evident that the views of His Honor, as to what was necessary to support his conclusion of law, were correct, i. e., that the "facts" must be found and set forth by him, in order that he might be reviewed on appeal. And it is evident, also, that His Honor supposed that he had set forth all the facts necessary, but we find that he has inadvertently failed to do so in several particulars. The only one necessary for us to mention, although there are others, is, that it was alleged by defendant that the suit was not transferred from the old Court to the new "at the first term after the new Constitution, and that it was omitted altogether from the docket at Fall Term, 1868."

Instead of finding how these facts were, His Honor simply declares, "That the action was transferred within the time prescribed by law." Now, it is evident that, whether the action was transferred within the time prescribed by law, depends upon the *fact when* it was transferred, and that fact is not stated by His Honor.

It is insisted that we ought to presume that His Honor found the transfer to have been at such time as was prescribed by law. But that would be the same as to presume that His Honor could not err as to what was the time prescribed by law, and such a presumption would make his judgment final.

We have discussed the same question in *Clegg* v. *New York White Soapstone Company*, at this Term, and see *Hudgins* v. *White*, 65 N. C., 303.

There is error. Let this be certified.

PER CURIAM. Error.

(425) DIANA GREEN *et al. v.* WILLIAM H. MOORE.

1. Where no final decree has been rendered in a suit in the late Court of Equity, it must be proceeded in according to the practice of Courts of Equity existing when our present Constitution was adopted.
2. Under the former system, orders and decrees in such suits could only be made in term time.
3. Where a petition for the sale of land was filed in one of the late Courts of Equity, no final decree having been rendered therein at the adoption of the Constitution, the Clerk of the Superior Court has no jurisdiction, and the Judge none, except at term time, to hear and determine a petition filed in the cause praying for a re-sale of the property.

Mason v. *Miles*, 63 N. C., 564, cited and distinguished from this case.

This was a petition filed in the Superior Court of Wayne County in vacation, setting forth in substance that certain land had been sold under a decree of the late Court of Equity for Wayne County, rendered in a petition praying for the same for partition, filed by the present petitioners as tenants in common thereof; that the defendant became the purchaser, and that the sale had been duly reported and confirmed, but had failed to pay the purchase-money, and praying for a re-sale thereof.

His Honor, Judge Clarke, heard and determined the same *in vacation*, and ordered a re-sale of the premises.

From which determination the defendant Moore appealed.

Isler, for the petitioners.

When anything can be accomplished by order, an action will not lie. *Council* v. *Rivers*, 65 N. C. R., 54; *Rogers* v. *Holt*, Phil. Eq., 108.

The Courts are always open. *Mason* v. *Miles*, 63 (426) N. C. R., 564; Const. Art. IV, sec. 28.

Moore & Gatling, for defendant.

DICK, J. This suit was commenced in the late Court of Equity, and was regularly transferred to the Superior Court. It appears from the record, that an interlocutory decree for the sale of the land was made, but there has been no hearing upon further directions, and a final decree made confirming the sale and determining the rights of the parties.

As the suit was in this condition when transferred to the Superior Court, it ought to have been proceeded in and determined according to the rules of Courts of Equity existing

when the present Constitution of the State was adopted. Const., Art. 4, sec. 25. C. C. P., sec. 402.

Under the old system, orders and decrees in a suit pending in a Court of Equity, could only be made in term time, and the Chancellor had no such jurisdiction at Chambers.

In a certain class of cases in England, the Chancellor would hear arguments and make decrees at his private room, but such decrees were only had by the consent of the counsel, and were regarded as the acts of parties rather than the action of the Court. 2 Daniel, Ch. Pr., 1191.

In this State the Chancellor sometimes heard causes and made decrees at his private room, but it was generally done by the consent of parties, and his action was always regarded as a proceeding in Court, and so entered on the record.

Mason v. *Miles*, 63 N. C. R., 564, was a case in which, under C C. P., a motion in the cause might have been made before the Judge out of term; as final judgment had been rendered before the case had been transferred from the old to the new Court.

The proceedings in the case for a re-sale of the land appear to have been commenced before the Clerk of the Superior Court, who had no jurisdiction in the matter, as the
(427) transfer of the case placed it on the regular docket of the Superior Court, within the exclusive jurisdiction of the Judge.

The Judge could only hear and determine the cause in term time, and his order of re-sale made at Chambers cannot be sustained.

The proceedings in the case must be dismissed.

PER CURIAM. Proceedings dismissed.

ASA BIGG, Executor, *v.* SAMUAL J. WILLIAMS, *et al.*

1. The survivor of two joint guardians may sue on a note payable to such guardians as such, and on his death *pendente lite*, the suit is properly revived in the name of his personal representative, as executor or trustee of an express trust, under section 37, C. C. P., notwithstanding that the wards have arrived at full age, and the note was assigned by the plaintiff to one of them.

2. Notwithstanding that sec. 80, ch. 113, Acts 1868-'69, be regarded as repealed by subsequent acts, and although it provides "that any executor or administrator, against whom an action is pending in any Court in this State, and who has heretofore entered pleas in such actions, may hereafter, (as a matter of right and without costs), amend, strike

out, or change such pleas at his discretion;" yet the provision does not contemplate the exercise of such privilege at any indefinite period, but an application thereunder must be made within a reasonable time.

3. A delay until the fourth Court after the passage of the act is unreasonable, and works a forfeiture of the right, and the granting of such motion is wholly in the discretion of the Court below.

4. Whether interest on a guardian note can be compounded after his death, *quere*; but such difficulty may be obviated by a remission of the interest alleged to be in excess, even in this Court.

This was an action of debt, commenced under the old system by one Sherrod, as the survivor of himself and one Cotton, joint guardians of two wards, and on the death (428) of Sherrod was revived in the name of the present plaintiff, as his executor, and was tried at the Spring term, 1871, of Martin Superior Court, before His Honor, Judge Moore, and a jury.

The facts are so fully and clearly stated in the opinion of the Court, that the reporter deems it a work of supererogation to attempt a recital of them.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Busbee & Busbee, for appellants.
W. N. H. Smith, for appellees.

RODMAN, J. This was an action brought by John J. Sherrod, guardian, etc, against Samuel Williams, William H. Gillikin and Winston, executor of Joseph Williams, upon a bond for $86, made by Samuel Williams, Gillikin, and Joseph Williams, and others, payable to the plaintiff, and to one Cotton, as guardian of Susan V. Clark and William S. Clark. Cotton, one of the payees, died between the making of the note and the commencement of the action. After the issuing of the writ the plaintiff Sherrod died, and at Spring Term, 1869, his death was suggested, and Asa Biggs, his executor, (the present plaintiff), was made party in his stead. At the same term the defendants pleaded payment and set-off. Susan Clark became of full age in 1866, and William Clark in 1868. Until after the death of Sherrod he held the note as the undivided property of the wards.

After Biggs, as executor of Sherrod, became a party, the note was assigned to William S. Clark, as a part of his share of the fund owned in common by him and Susan.

At Spring Term, 1871, the action was called for trial, and

Winston, as executor of Joseph Williams, demanded leave to add his former pleas, that of fully administered. The Judge asked him if he had not been present at a previous Term of the Court, and upon his saying that he had
(429) been, the Judge refused to allow him to enter the proposed plea.

The case was then submitted to the jury, who, under the instructions of the Judge, found all the issues for the plaintiff, and assessed his damages at compound interest up to the arrival at full age of William Clark. The defendant, Winston, appealed.

The exceptions taken by the appellant are:

1. That after the death of Sherrod, the action should have been continued in the names of his wards, Susan and William Clark, and not in the name of his executor. Sec. 57, C. C. P., provides that an executor, or trustee of an express trust, may sue without joining with him the party equitably interested. So that the action was properly continued in the name of the executor of Sherrod. Under the old system it was never doubted that a note, payable to a guardian as such, must be sued on by his personal representative after his death, unless some circumstances existed to give a Court of Equity jurisdiction, such as a refusal by the trustee to allow his name to be used, etc.

2. That the refusal of the Judge to allow the motion of Winston, executor of Joseph Williams, was erroneous. This was the point most insisted on in the Court.

The right was claimed under the Act of 1868–'69, ch. 113, sec. 80, p. 278. It was contended by plaintiff, that this section was, in effect, repealed by the Act of 1869–'70, ch. 58, p. 98, and was not covered by the exception in that act relating to practice and process. We need not state the argument upon either side of this last point, for we are clearly of the opinion, that supposing section 80, of ch. 113, of the act of 1868–'69, not to have been repealed, but to have been in force at Spring Term, 1871, of Martin Superior Court, when the motion to amend was made, the defendant Winston, was not then entitled of right to add to his pleas, as he moved to do. The words of the act are general, viz:

(430) "That any executor or administrator against whom any action is pending, in any Court of this State, and who has heretofore entered pleas in such action,

may *hereafter*, as a matter of right and without amend, strike out or change such pleas at his discretion, etc."

But it must be necessarily implied that this amendment must be made within a reasonable time after the time when the act went into effect, which was on the 1st of July, 1869. It cannot be supposed that the Legislature intended to give a defendant the right to change his pleas at any indefinite future time. It is easy to see that such a right might be prejudicial, and perhaps inequitable, to a plaintiff, even if exercised within the shortest time, and that, to give it the extent contended for, would be unreasonable.

In this case, the application to put in new pleas was not made until the cause was called for trial at the fourth Term after the passage of the act of 1868–'69. We concur with the Judge below, that the defendant had forfeited his right, and that it was discretionary with the Judge to allow his motion on not. From the exercise of that discretion, it is needless to say, there is no appeal.

That the plaintiff was not entitled to compound interest after the death of Cotton; that exception was modified in this Court, and here the defendant only contended that the compounding should stop as to half the note upon the arrival at age of Susan Clark.

The plaintiff has remitted one-half the compound interest from that date, and we are therefore not called on to give any opinion upon this question.

Thus modified, we think there is no error in the judgment below, which is accordingly affirmed.

PER CURIAM. Judgment modified and affirmed.

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(431) STATE on the relation of W. H. Howerton *et al.*, *v* S. McD. TATE *et al.*

Since the passage of the Act of 1870–'71, chap. 42, the Clerk of the Superior Court of one County, cannot issue a summons returnable in the Superior Court of another.

This was an action in which the summons was issued by the Clerk of the Superior Court of Rowan County, and made returnable to the Superior Court of Buncombe County.

At Fall Term 1871 of Buncombe Superior Court, His Honor Judge Henry, presiding, it being the summons term, the relators filed their complaint, whereupon the defendants moved

to dismiss the action for want of jurisdiction. This motion was sustained by His Honor, and the relators appealed.

Fowle, Blackmer & McCorkle and *W. H. Bailey*, for the appellants.

Phillips & Merrimon and *David Coleman*, for the appellees.

RODMAN, J. The only question in this case is whether the Clerk of Rowan Superior Court could issue a summons to be served in Buncombe Superior Court. The summons was dated 14th of November, 1871.

The Judge below thought the Clerk had no such right, and dismissed the action. We concur with His Honor.

The practice is regulated by the Act of 1870–'71, ch. 42, which was ratified on the 25th day of January, 1871, and says, "that the summons shall be signed by the Clerk of the Superior Court having jurisdiction to try the action."

PER CURIAM. Judgment affirmed.

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(432) F. E. WINSLOW *v.* HENRY WEITH, Sheriff.

The Superior Courts possess no jurisdiction in actions in which a tort is waived and the sum received for property sold is sought to be recovered, if the amount demanded does not exceed $200.

This was a civil action tried at the Fall Term 1869, of Perquimans Superior Court, before His Honor, Judge Pool, in complaint and demurrer.

The complaint set forth in substance, that the defendant, under color of certain tax-lists, had exacted of the plaintiff illegally, taxes to the amount of $152, and that he had under said tax-lists, seized and sold property of the plaintiff for the price of $152.

The plaintiff in his complaint, waived the tort, and sued in complaint for the price. His Honor sustained the demurrer, and the plaintiff appealed.

Smith, for the appellant.

Phillips & Merrimon, for the appellee.

RODMAN, J. This action, as it stands since the complaint was amended, is to recover $152, being an alleged illegal excess of taxes, which the plaintiff paid to the defendant as

Sheriff, under protest. It is founded on an implied contract, and being far less than two hundred dollars, the Superior Court clearly had no jurisdiction, and the demurrer is sustained on that ground.

Judgment against the plaintiff for costs.

PER CURIAM. Judgment sustained.

The following note is added by order of the Court:

The counsel by whom the above case was argued, treated it as necessarily requiring an expression of the opinion of the Court, as to the taxing power of the Legislature under the Constitution, and the Court supposing that it did, kept it under advisement for several terms, for the (433) purpose of considering the very novel, difficult and important questions involved. Upon examining the record, however, it was discovered that the case was not properly in Court, and that the supposed question did not arise, and as the Court had no desire to express any opinion on questions ofsuch a character unnecessarily, it abstained from doing so. While, however, it was supposed that it would be necessary, Judge Rodman prepared and submitted to his associates, for consideration, a view of the questions, which the Court desired to be printed in an appendix to the reports of this term. The opinions and arguments therein are not considered as conclusive, even in the judgment of the author, and of course as not indicating in any way the opinions of the other Justices. The publication is thought justified by the novelty, difficulty, and great public importance of the questions discussed, and is made with the hope that the bar, upon whose honest aid the Court always relies, will, in case they should hereafter be presented for discussion, be prepared to aid the Court in meeting them advisedly. The most serious difficulties, it will be seen, are not visible at the first glance; they lie beneath the surface. The paper referred to will be found in the appendix

P. N. DULIN *v.* WALKER HOWARD.

1. Proceedings taken before a Justice of the Peace to recover the possession of real estate where the title comes in question, are not absolute nullities.
2. The defendant may so treat them, but it does not follow that the plaintiff, who initiated and took the benefit of them, can.
3. When one is deprived of his land under color of judicial proceedings heard before such Justice, although jurisdiction is absolutely withheld from such Justice, on general principles the Superior Courts, on appeal, have a right to award him restitution.
4. Nor was the Superior Court confined, in dispensing the law, on appeal, to mere restitution; but could also have allowed, had it been applied for, an inquiry of damages.

This was an appeal from a Justice's Court, heard before His Honor, Judge Cannon, at Fall Term, 1871, of Davie Superior Court.

The plaintiff had commenced proceedings, by virtue of a purchase at execution sale, of certain realty, sold as the property of the defendant under sec. 31, chap. 159, Acts
(434) of 1868–'69, before a Justice's Court, and obtained judgment and was put into possession.

These proceedings were completed before the case of *Credle* v. *Gibbs*, 65 N. C. R., 192, was decided.

The defendant appealed from the judgment of the Justice to the Superior Court.

In that Court the defendant moved to quash the proceedings and for a writ of restitution. His Honor held that the Justice had no jurisdiction, and that the proceedings were null and void, and ordered them to be quashed and a writ of restitution to issue.

From this judgment the defendant appealed.

W. H. Bailey, for the appellant.

By virtue of the decision of *Credle* v. *Gibbs*, 65 N. C. R. 192, a Justice of the Peace has no jurisdiction.

He is debarred jurisdiction; it is absolutely and entirely withheld.

Hence *quoad hoc*, his judgment has no greater or other effect than if he were a private person.

In the language of the law, his action from first to last was a nullity.

There being no foundation, no superstructure can be raised. *Burroughs* v. *McNeill*, 2 D. & B. Eq., 297. McNamara on Nullities, pp. 3, 6, and 137.

Fowle, for the appellee.

RODMAN, J. The defendant contends that the proceedings before the Justice, being upon a matter beyond his jurisdiction, are nullities, and are as absolutely void as if they had not been had.

We agree that the defendant may treat them so, but it does not follow that the plaintiff, who initiated and has taken
(435) the benefit of them, can. He cannot take advantage of his own wrong. If the rule were absolute, as contended for, no appeal could be had from the Justice's judgment, and the Superior Court should have dismissed the defendant's appeal at his cost. The defendant has been de-

prived of the possession of his land by color of judicial proceedings, and we think on general principles the Superior Court has the right, which it would have been an injustice not to have exercised, to give him restitution. In addition, this duty is expressly prescribed by sec. 27 of the Landlord and Tenant Act 1868–'69, ch. 156, p. 355.

We think that the defendant was entitled, not only to restitution of the possession; but, if he had asked for it, to an inquiry as to the damages he had sustained by being deprived of it. We find this decided upon the reversal of a judgment for error in *Sympson* v. *Juxon*, Cro. James, 698. Sec. 30 of the Landlord and Tenant Act gives a defendant damages, if he has been turned out of possession by a proceeding which is quashed; and there can be no reason why he should be put to a separate action to recover them.

There is no error.

PER CURIAM. Judgment affirmed.

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(435) GEO. W. SWEPSON *v.* JOHN C. HARVEY *et al.*

1. If the defences set up in an answer are worthy of consideration, they cannot be deemed frivolous.
2. In such case, the plaintiff should reply or demur, and if the demurrer be overruled, it becomes the duty of the judge to allow him to plead over; unless it is manifest that such demurrer is frivolous, does not raise any question of law worthy of serious consideration, and is interposed merely for delay.
3. The spirit and intent of the Code is that actions shall be tried as speedily and cheaply as possible, and upon their merits.
4. An answer to a complaint on a covenant for the payment of money, executed by the defendants, and alleged to have become the property of the plaintiff by successive assignments, which alleges that there was a condition underwritten said covenant, to make it void if the land for which the covenant was given was subject to incumbrances, and that at the time of the execution of the same said land was subject to the lien of execution against the covenantee; and further, that the assignment of the covenant from the covenantee was procured by duress and fraud, and while the covenantee was mentally incapacitated to contract, and that the plaintiff took his assignment with full knowledge of these facts, and that the plaintiff had caused a previous action on the same in the name of the covenantee, to be brought, which had been dismissed, and had filed a bill to compel the covenantee to allow the use of his name for that purpose, which had also been dismissed, and that afterwards the defendant had, after a full account with the covenantee, procured his release of the cause of action; *Held*, that such defences are not frivolous, but are worthy of serious consideration.

The case of *Erwin* v. *Lowery*, 64 N. C. R., 321, cited and approved.

SWEPSON *v.* HARVEY.

This was a civil action, tried before His Honor, Judge Tourgee, at Fall Term, 1871, of Alamance Superior Court.

The action was based upon a bond for the payment of money, and the defendants filed an answer to the effect stated in the 4th syllabus. The plaintiff moved for judgment as by default, treating the answer as impertinent and frivolous. This view was sustained by His Honor, who rend-
(437) ered judgment accordingly, and the defendants appealed.

W. A. Graham, J. A. Graham & J. W. Graham, for the appellant, relied on *Erwin* v. *Lowery*, 64 N. C. 321.

Phillips & Merrimon, Dilliard & Gilmer, and *Scott & Scott*, for the appellee.

RODMAN, J. In this case the plaintiff moved for judgment on his complaint on the ground that the defences set up in the answer were frivolous. What is meant by a frivolous answer is defined in *Erwin* v. *Lowery*, 64 N. C., 321.

It is there said if the defences set up in the answer are worthy of serious consideration, they are not frivolous. Clearly the defences set up in the answer in this case are worthy of serious consideration. It is the duty of the plaintiff to demur or reply to the several defences as he may be advised. He cannot get the opinion of a Court on the merits of the defences on the pretence that they are frivolous. If he demurs, and his demurrer is overruled, the Code leaves it to the discretion of the Judge to allow him to answer or not. We think it is the duty of the Judge always to allow a party to plead, after his demurrer is overruled, unless it is manifest that the demurrer was merely frivolous, did not raise any question of law worthy of serious consideration, and was interposed merely for delay. The spirit and intent of the Code is, that all actions shall be tried as speedily as possible, as cheaply as possible, and upon their merits. Keeping these subjects steadily in view, all amendments of pleadings and repleadings must be liberally allowed, which tend to promote them, and those only denied which tend to defeat them.

There was error in the judgment below which is reversed, and the case is remanded to be proceeded in according to law. The defendant will recover costs in this Court.

PER CURIAM. Judgment reversed.

(438) D. M. GUDGER *v.* A. E. BAIRD *et al.*

1. If a suit be referred by an entry on the docket in these words, viz: "this case is referred to A. B, who shall summon the parties before him and hear the case, and his award shall be a rule of Court," and the referee files a paper which he styles an award, in which he finds the facts and his conclusions as an award, whether it is to be treated as an award under a rule or a reference under the C. C. P.. the referee's finding of the facts is equally conclusive, as are also his conclusions as to the law arising on the facts, except probably where he undertakes to make the case turn upon a question of law and clearly mistakes it.
2. Where a guardian lent trust funds to a firm of whice he was a member, and took their note payable to himself, although under the old system he could not sue at law, under the present system, by virtue of the conjunction of law and equity, a civil action upon such instrument may be maintained.
3. Independent of this view, relief under the C. C. P., sec. 249, is obtainable on the principle that the *cestui que trust* may follow the trust fund into whose hands soever the funds may be found.
4. Nor in a suit on such note by the husband of the ward, to whom it had been assigned by the guardian, can it be objected that the guardian is not made party as by virtue of sec. 63, C. C. P.; persons severally liable may all, or any, be included as defendants.
5. The objection that one of the wards is not made a party, induces the Court to modify the judgment of the Court below.

This was a civil action tried before His Honor, Judge Henry, at Fall Term, 1871, of the Superior Court of Buncombe county.

The case was heard upon the complaint, answer, award and exceptions thereto. It appears from the record that one Vance was the guardian of the plaintiff's wife and Robert Taylor, and that he lent money belonging to his wards to the firm of Smith, Baird & Vance, of which he was a member, and wrote their note payable to himself, and endorsed by him to the plaintiff.

(439) The defendant contended the note was valid. The case was referred to Col. W. M. Cocke—the entry being in these words: "This case is referred to W. M. Cocke, who shall summon the parties before him and hear the case, and his award shall be a rule of Court." The referee files a report, calling it an award, and therein ascertains the facts, and states his conclusions as to the law arising on the facts.

To this report, exceptions were filed by the defendant and overruled by the Court, and judgment pronounced in accordance with the terms of the report, or award, from which the defendants appealed.

No Counsel, for plaintiff.
M. Erwin, for defendants.

READE, J. Upon the coming in of the complaint and answer, there was the following entry on the record:

"This case was referred, by consent of the parties, to W. M. Cocke, Sen., who shall summon the parties before him and hear the case, and his award shall be a rule of Court. To report to the next term of the Court."

And at the next term, said Cocke reported as follows:

"The undersigned, to whose award and arbitrament the above mentioned case was referred by a rule of Court, begs leave to report, &c." And then he states the facts as he finds them. And then he says, "from the foregoing facts I award, &c." And then the following entry appears on the docket:

"Exceptions to award. The defendants except to the award, &c." And then the Court says, "Exceptions overruled, the award in all things confirmed, &c."

And in the statement of the case for this Court it is said, "There was judgment for the plaintiff according to the award, &c."

From all this it would seem to be the ordinary case of a reference to arbitration, and an award and judgment (440) according the award. If this is so, then there seems to be no force in the exceptions; for awards are favored, and the finding of the facts by the arbitration is conclusive, and errors of law are not reviewed, except probably when he undertakes to make the case turn upon a point of law and clearly mistakes it.

It is proper, however, to say that the case was not treated in this Court on the argument as an award, but as a reference and report under C. C. P., sections 244, 246 and 247.

Considering the case, then, as a proceeding under the Code, it must still be true that the finding of the facts must be conclusive; for it is said that "when the referee is to report the facts the report shall have the effect of a special verdict." It would then remain to be considered whether there are any errors of law which are fatal to the plaintiff's recovery.

It seems that one R. B. Vance was guardian of the plaintiff's wife and her brother, Robert Taylor, and he was also a member of the firm of Smith, Baird and Vance, viz: the defendants and himself; and that he loaned to said firm $770 of his ward's money, and took the note of the former payable

to himself as guardian, and subsequently endorsed the note to plaintiff to pay the share due to his wife and so much of the balance as was necessary to pay over to Robert Taylor, the other ward.

This suit is upon that note. And now the defendants, Smith and Baird, object that the note is null and void, because said Vance is both payor or payee.

It is said that an action at law could not be maintained on said note, and that whatever remedy there was, was in Equity. While, therefore, an action at law could not have been maintained on such note formerly, yet as legal and equitable remedies may now be had in the same proceeding, the objection is without force.

The plaintiff is clearly entitled to relief on another ground, and although it is not precisely the relief asked for, yet the Code provides that when one is entitled to relief in a form and manner different from that in which it is sought, it is the duty of the Court to afford it. C. C. P., sec. 249.

(441) The complaint set out, and the fact is reported to be true, that a trust fund—(guardian money)—belonging to the wife of the plaintiff and her brother, Robert Taylor, went into the hands of the defendants by a loan from Vance and that Vance is insolvent. And it is settled that the *cestui que trust* may follow the trust into whose hands soever the same may be. Treating the note therefore, as void as a note, and using it only as evidence of the deposit of the trust fund, the defendants are clearly liable. There is, therefore, no force in that objection.

The objection that Vance is not a party is without force, because persons who are severally liable may all, or any, be included as defendants. C. C. P., 63.

The objection that Robert Taylor is not a party plaintiff has this force: that the judgment must be modified so as to reduce the amount to the sum of the share of the plaintiff's wife in the fund due from the guardian, as appears by the report of Cocke, and there will be judgment here in favor of the plaintiff for that amount.

We have considered whether we could not give judgment here for the whole sum, and allow it to be paid out only on motion of Robert Taylor and Vance, and whether we could not provide so as to hear the defendants here upon any equity which they may have against Robert Taylor; but in view of the fact that our jurisdiction is appellate, only, we have con-

cluded to modify the judgment, so as to give the plaintiff the amount reported in her favor as aforesaid, and remand the case subject to such judgment here, in order that new parties may be made as the parties may be advised.

Judgment modified and case remanded. This will be certified.

PER CURIAM. Case remanded.

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(442) R. M. OATES *et al. v.* W. G. GRAY.

1. The object of the Code was to abolish the different forms of action, and the technical and artificial modes of pleading used at common law, but not to dispense with such degree of certainty, regularity and uniformity as are deemed essential in every system adopted for the administration of justice.
2. The pleadings must contain the same substantial certainty, now, as was formerly requisite in a declaration, &c., and unless the defendant controverts the facts alleged, they must be taken as true for the purposes of the action. C. C. P., 127.
3. The word "plead," used in the Act of 1868-'69, chap. 76, sec. 4, must be regarded as an inadvertence, and was not intended to change the Code system.
4. An entry on the docket of "general issue, stat. lim., with leave," is not sufficient pleading, and in the discretion of the Judge below would authorize judgment of *nil dicit*.
5. If a complaint is founded upon assumpsit for goods sold, a final judgment, without proof of value, &c., as upon a default, is erroneous.
6. In such cases, the Clerk must ascertain the amount due in the mode prescribed by sec. 217, C. C. P.
7. The entry on the docket was sufficient notice of appearance to entitle the defendant to the five days' notice under the statute.

This was a civil action, tried before His Honor, Judge Logan, at Fall Term, 1871, of Mecklenburg Superior Court.

The action was founded on a note and an account for goods sold, money lent, &c. At the return term the defendant failed either to answer or demur, but counsel marked their initials to the case opposite the name of defendant, and entered on the summons docket the words "general issue, *stat. lim.*, with leave."

On the calling of the cause the plaintiff moved His Honor for judgment, as demanded in the complaint, which was granted by His Honor without any previous ascertainment of the value of the goods alleged to have been sold.

(443) From this judgment the defendant appealed.

Dowd, for the appellant.
Jones & Johnston, for appellee.

DICK, J. The object of the Code was to abolish the different forms of action, and the technical and artificial modes of pleading used at common law, but not to dispense with the certainty, regularity and uniformity which are essential in every system adopted for the administration of justice.

The plaintiff must state his cause of action with the same substantial certainty as was formerly required in a declaration; and the defendant must controvert the allegations of the complaint, or they will be taken as true for the purposes of the action. C. C. P., sec. 127.

The only pleading on the part of the defendant is either a demurrer or an answer. C. C. P., sec 93.

The word "plead," used in the Act of 1868–'69, chap. 76, sec. 4, must be regarded as a mere inadvertence on the part of the Legislature, and was not intended to change the system adopted by the Code, and restore the old practice of loose pleading which was never recognized by law. That such was not the intention of the Legislature, is clearly manifested in the next section of the act.

The entry made on the docket, "general issue, stat. lim. with leave," was not sufficient pleading and the Judge, in the exercise of his discretion, could enter judgment for the want of a sufficient defense.

The judgment entered in this case is erroneous, for it is a final judgment for the amount claimed by the plaintiff, when it should have been interlocutory. The complaint is not sworn to, and the 2d and 3d causes of action alleged are for property sold and money lent on open account. In such cases before the entry of judgment, the Clerk must ascertain
(444) the amount which the plaintiff is entitled to recover, in the manner provided in C. C. P., sec. 217.

The entry made on the docket by the defendant was a sufficient notice of appearance, and he was entitled to five days' notice of the time and place when the assessment would be made by the Clerk. As the judgment must be set aside for error, His Honor in the Court below may, in his discretion, allow the defendant to enter a defense in conformity with law. C. C. P., sec. 133.

As the erroneous judgment was not the ground of the appeal, neither party is entitled to costs.

Let this be certified to the end that proper proceedings may be had, &c.

PER CURIAM. Judgment reversed.

R. J. and R. W. McDOWELL, Admr., *v.* D. ASBURY *et al.*, Exec's.

1. After a judgment fixing an executor with assets, and a return of an execution issued thereon *nulla bona*, the proper mode to subject such executor, personally, is by motion founded on notice and not by civil action.
2. Writs of *scire facias* consisted of two classes, the object of the first class being to remedy defects in, or to continue an action; that of the second class, to commence some proceeding.
3. Proceedings in the nature of a *sci. fa.* of the first class are almost indispensable in the administration of justice, and the object of the Code was merely to abolish the name and form of writs of this class, and simplify the process into a notice or summons, to show cause why further proceedings should not be had to provide further reliefs, in matters where parties had had a day in Court, &c., and not to effect the substance of the remedy.
4. On such motion, the Judge may allow the defendant to make any defense which he could have availed himself of under the old *scieri facias* proceeding.
5. The form of pleading and practice to be pursued in order to sub-
(445) ject executors and administrators personally, under the former system, elucidated by DICK, J.

The cases of *Binford* v. *Alston*, 4 Dev., 351; *Mann* v. *Blount*, 65 N. C. R , 99; *Mason* v. *Miles*, 63 N. C. R., 564, and *Jones* v. *Gupton*, 65 N. C. R., 48, cited and approved.

This was a motion for an execution *de bonis propriis* on notice, heard and determined by His Honor, Judge Moore, at July Term, 1871, of Mecklenburg Superior Court.

The plaintiffs had theretofore received a judgment against the defendants as executors, fixing them with assets and caused an execution *de bonis testatoris* to issue, which had been returned *nulla bona.*

Thereupon this motion was made, which His Honor declined to grant, on the ground that the proper remedy was by a civil action.

The plaintiff, from this ruling of His Honor, appealed.

R. Barringer, for appellant.
J. H. Wilson, for appellee.

DICK, J. The administrator withdrew his plea of "fully

administered," and allowed judgment to be entered against him for the debt of his intestate. This judgment fixed him with assets, and an execution was issued and returned *nulla bona*, &c. The plaintiff after giving notice to the administrator, to make a motion before His Honor for an execution *de bonis propiis.*

The motion was refused on the ground that a civil action was the proper remedy. In such cases the C. C. P. has provided no specific remedy, and we must consider the general scope and purpose of the Code on determining whether or not the ruling of His Honor was correct.

In examing this question we will first enquire briefly into the remedies at common law, against an executor or administrator, when he has made himself liable *de bonis propiis.*

A personal representative is required to act honestly
(446) and faithfully in the discharge of his trust, and he is liable only so far as he has assets, or might have had them by reasonable diligence, unless he subject himself to liability by his own act. When a personal representative is sued he must protect himself by proper pleading. If he plead any false plea in bar of the action, such as *ne unquis executor*, or a release to himself, and rests his defence only on such plea, and the issue be decided against him, the judgment in the first instance must be *de bonis testatoris si non de bonis propriis*, for it is falsity which falls within his own knowledge. Where he puts in pleas which tend to defeat the plaintiff's cause of action, and which may not be false within his own knowledge, as *non assumpsit*, or a release to the intestate; and at the same time pleads *plene administravit*, the plaintiff may take a judgment *quando* as to the latter plea, and join issue on the former, and if he obtain a verdict he can have an execution for costs against the defendant *de bonis propriis.*

If, however, in either of the above cases the plea of *plene administravit* is put in, and issue is joined as to all the pleas, and the latter plea is found in his favor, he is entitled to a general judgment with costs, although the other issues are found against him. Williams on Ex'r, 1389. When a personal representative was fixed with assets by a judgment and the assets could not be obtained by an ordinary execution, several modes were formerly in use in England to subject him personally. In the Court of King's Bench in former times, the usual practice upon the return of *nulla bona testatoris* was to sue out a special writ of *fieri facias* against the

assets with a clause suggesting a *devastavit*, and if no goods of the testator are found, then it could be levied *de bonis propriis.*

The practice in the Common Pleas was to issue a special *fieri facias*, suggesting a *devastavit*, with a clause directing the sheriff to enquire by a jury as to what had become of the assets, and if they found a *devastavit* by the executor, (447) then a *scire facias* was issued to the executor, to show cause why a *fieri facias de bonis propriis* should be awarded against him.

In process of time, the practice of the two Courts was made uniform by joining the special *fieri facias* injury with the *scire facias*, into one writ, called the *scire fieri* inquiry, from the first words of the two writs which were thus incorporated.

This writ fell into disuse in England, as the plaintiff was not entitled to costs, unless the defendant appeared and plead to the writ. The usual proceeding in such cases is an action of debt on the judgment, suggesting a *devastavit.* 1 Saund. R., 219, notes.

The last named remedy was formerly used in this State, but the *scire fieri* enquiry was never adopted. In former times in some parts of the State, the special *fieri facias* once used in the King's Bench, was resorted to, but in the case of *Hunter* v. *Hunter*, N. C. T. Reports, 122, the more simple and expeditious process of *scire facias* was prescribed as the proper remedy in such cases.

A *scire facias* on a judgment, is not a new action, but is only issued as a continuation of the former suit. *Binford* v. *Alston*, 4 Dev., 351; 2 Tidd, 983.

When the object is to obtain an execution on a judgment it is properly called a writ of execution. 2 Tidd, title *sci. fa.*

In some cases a *scire facias* is an execution as the defendant may plead to it, but he cannot deny the merits of the judgment upon which it is founded. Thus, on a *sci. fa.* upon a judgment against an administrator, fixing him with assets, he would not be allowed to plead *plene administravit*, or any other plea of the same nature, which puts his defence upon a want of assets. 1 Saund. R., 219.

The *scire facias* when used under the old system for the purpose of obtaining an execution *de bonis propriis*, on a judgment against an administrator, although it was styled a judicial writ, was nothing more than a notice to show cause why an execution should not issue.

The C. C. P. merely abolished the form, and did not
(448) effect the substance of the remedy. The plaintiff in this case gave notice to the defendants that he would make a motion in the cause in term time for an execution *de bonis propriis*, etc. The Judge, under the liberal provision of the C. C. P., might have allowed the defendant to make any defence which he could have availed himself of under the old *scire facias* proceeding. The plaintiff cannot obtain a direct and speedy remedy on his judgment in any other way than the one which he has adopted. A civil action cannot be brought on a judgment without leave of the Court, for good cause shown upon notice to the adverse party. C. C. P., sec. 14.

This leave could not be allowed, as this Court has often decided that an action cannot be entertained which seeks no other relief than that which can be had in a case then pending. *Mann* v. *Blount*, 65 N. C., 99; *Mason* v. *Miles*, 63 N. C., 564.

The Code has abolished the writ of *soire facias*, C. C. P., sec. 362, but this section does not require a civil action to be brought to obtain a remedy in cases like the one we are now considering.

There were two forms and purposes of writs of *scire facias* at common law.

1. A writ which was used to remedy defects, or as a continuation of some former suit.

2. A writ in the nature of an original writ, used to commence some proceeding.

The Code does not apply to the former, but only to the latter kind. This distinction is shown in many provisions of the Code.

Under the old system writs of *sci fa* of the first class were used to prevent abatement of suits, and remedy defects arising by a change of parties, etc. Under the Code, the objects are accomplished by a motion in the case. C. C. P., 54.

After a lapse of three years from the entry of judgment an execution can be issued only on motion, with notice
(449) to the adverse party. C. C. P., 256. Formerly a *sci fa* was used to obtain an execution on a dormant judgment. In the case of the death of a judgment debtor, his personal representative must be summoned to show cause why the judgment shall not be enforced. C. C. P., 319.

Other instances of a similiar character might be given to show that it was not the purpose of the Code to require a civil action to be brought to obtain relief in cases where it was formerly furnished by a writ of *sci fa* of the first class above mentioned.

We will now refer to some of the writs of the second class. At common law a writ of *scire facias* to repeal letters patent is an original writ issuing out of Chancery. Under the Code, a civil action must now be brought for that purpose. Sec. 367.

A writ of *sci fa* to subject bail was an original proceeding, and in such a case the Code requires a civil action to be brought. Sec. 160.

A *sci fa* to enforce an amercement against a sheriff was in nature of an original writ, and now a civil action is required.

Jones v. *Gupton*, 65 N. C., 48—proceedings in the nature of writs of *scire facias* of the first class, are almost indispensible in the administration of justice. The Code only intended to abolish the name and form, and simplify the process into a notice or summons to show cause why further proceedings should not be had, and to furnish further relief in matters where the parties had had a day in Court.

If these objects could only be obtained by civil actions, the costs of legal proceedings would become burdensome and the consequent delay would almost amount to a denial of justice.

There was error in the ruling of His Honor. Let this be certified to the end that proper proceedings may be had in the cause.

PER CURIAM. Error.

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(450) W. J. SPRINKLE *et al v.* E. NYE HUTCHINSON *et al.*

1. Proceedings to effect a settlement of an estate against an executor must be commenced before the Probate Court.
2. If in the course of the proceedings, injunctive relief is desired, application must be made to a Judge of the Superior Court.
3. Whether, on a clear case for an injunction made by the complaint, this Court would force a plaintiff by dismissing his action to begin *de novo* in the Probate Court, discussed; but deemed unnecessary to be decided, as the Court does not consider such a case made by the complaint.

4. A complaint which alleges that an executor had power to sell land under the will, and sold for Confederate money, received it and is about to make purchaser a title ; that the executor is insolvent and is wasting the assets, but does not charge collusion with the purchaser —does not present a case entitling the plaintiff to injunctive relief.

The cases of *Hunt* v. *Sneed* 64 N. C., 176. and *Finger* v. *Finger*, 64 N. C., 183, cited and approved.

This was a civil action heard on motion to vacate an order of injunction, and to dismiss the action, heard before His Honor, Judge Moore, at the July Special Term, 1871, of Mecklenburg Superior Court.

The facts are sufficiently stated in the opinion of the Court, to a proper understanding of the points determined.

His Honor granted the motion to vacate, and denied the motion to dismiss, from which ruling the defendants appealed.

Jones & Johnson for plaintiff.
J. H. Wilson and *W. H. Bailey* for defendants.

RODMAN, J. This action began by summons returnable before the Judge of the Superior Court of Mecklenburg in term time.

(451) The plaintiff complained:

1. That one Holton died in 1860, leaving a will which was duly proved, and that the defendant qualified as executor.

2. That the testator was seized and possessed of valuable real and personal estate, which went into the possession of the executor.

3. By his will, the testator devised all his real and personal estate to his executor in trust to pay his debts, and then to divide the same among his heirs, with power to sell any portion of the estate privately or publicly in his discretion.

4. The plaintiffs are the heirs and distributees of the testator,

5. That on the 13th of October, 1863, the executor sold several valuable lots and notes at six months to divers persons, some of whom complied with the terms by giving notes, and others did not; none have paid, and the prices were very inadequate. In the Spring of 1864, however, he did receive Confederate money from one of the purchasers, and conveyed to him the land he had bought.

6. That the executor has misapplied the funds of the estate, and is insolvent.

7. That the widow dissented, and had dower assigned to her.

The plaintiff prays that the executor be enjoined from receiving payment for the lands sold, and from making deeds therefor, and for an account, and the appointment of a receiver, &c.

It is unnecessary to state the answer, except that defendant admits that he is executor, and has received certain goods and lands of his testator, and that he is liable to an account.

An injunction was issued as prayed for, a motion was made to vacate the same, and also a motion to dismiss the bill for want of jurisdiction; the Judge allowed the first, but refused second, whereupon the defendant appealed.

This case is governed by *Hunt* v. *Sneed*, 64 N. C., (452) 176. In that case it is said that the Clerk as Probate Judge has original jurisdiction of all proceedings for the settlement of the estates of deceased persons. Const., Art. IV, sec. 17, and Act of 1868–'69, ch. 113.

The case of *Finger* v. *Finger*, 64 N. C., 183, does not at all conflict with *Hunt* v. *Sneed*. In *Finger* v. *Finger*, it does not appear but that the action was begun before the passage of the Act of 1868–'69. Probably it was. But if it was not so, the two cases are distinguished by the difference in the objects of the actions, and the nature of the relief sought. In the latter case, the administrator had procured from the county court, an order from the sale of land in a proceeding to which some of the heirs had not been made parties, and when he had, or ought to have had, sufficient personal property to pay the debts. The bill was by the heirs, and prayed for an injunction against the sale until an account should be taken, which was allowed, and an account taken in that Court. The account and settlement of the estate, was not the primary object of the action, and came in only as incidental to the main relief—the injunction, which the Probate Court could not grant. Here, as in *Hunt* v. *Sneed*, the primary object is an account and settlement of the estate, and as incidental thereto, an injunction is asked for to restrain the executor from completing the sales of the land which he has made fraudulently, as is alleged. In *Hunt* v. *Sneed*, it is said: "In every case in which the Court of Probate can give an adequate remedy, the party seeking it must apply to that Court."

Without copying the whole passage referred to, it proceeds in substance to say that if any part of the relief sought, con-

sists of an injunction which the Probate Court cannot order, the party needing it may apply to the Judge of the Superior Court. Such an order would not oust the jurisdiction of the Probate Judge; the action for the account would still proceed before him, and according to the judgment given by him, either party might apply to the Judge of the Superior Court to vacate, continue, or modify the injunction.
(453) This rule seemed to us to be the only one which would not lead to the inconvenience of either taking entirely away from the Probate Court its pecular jurisdiction over the accounts of executors, &c., or else of having parts of the same settlement in two courts at the same time, whereas it is not seen that any inconvenience is likely to arise from giving the Probate Court exclusive original jurisdiction over the account with leave to any party to apply to the Judge of the Superior Court for any order necessary to make the relief complete, which is beyond the power of the Probate Court. And this is more evident than before, since by recent legislation no court but the Probate Court can audit the account of an executor, at the instance of a creditor, or while debts remain unpaid. The only question in the present case not covered by the decision, in *Hunt* v. *Sneed*, seems to be this

Considering that a part of the relief prayed for in this case (the injunction) is beyond the power of the Probate Court, and might be granted for sufficient reasons upon the commencement of an action for an account; whether the Superior Court, instead of dismissing the bill and turning the plaintiffs over to begin in the Probate Court, and then come to the Superior Court for the injunction, could not take cognizance of the action so far as to grant the injunction and order the plaintiffs to bring their action for an account in the Probate Court. The only objection which occurs to us as making against this course is, that it makes the application for the incidental relief precede the primary one. And certainly the appearance of the proceedings would be more orderly and symmetrical by beginning in the Probate Court. But for the sake of this orderly appearance, are we compelled to dismiss the present action, when every end of justice can be attained by another course? If it be said that the the defendants ought not to be exposed to the risk of costs in two independent actions when one alone would suffice; the answer is, the costs of the application for the
(454) injunction are entirely in the control of the Judge of

the Superior Court, who will take care to see that the defendant shall not in any event be made to pay any additional costs by reason of the plaintiff's inversion of the regular order of proceeding We are inclined to think, therefore, that if a case for the continuance of the injunction had been made out, it would have been for the Judge to have continued it and to have directed the plaintiffs to proceed by an action in the Probate Court for an account. If the action in *Finger* v. *Finger* was brought after the Act of 1868–'69, this should probably have been the course taken there. But it is not necessary to decide this question, because, in the present case, the Judge thought there was no ground for the injunction, and we agree with him.

It is charged that, in 1863, the executor sold a lot to Davidson and took his note for the price payable in Confederate money, but made no present conveyance to him, and that he is now about to make a conveyance for a much less sum: much less than the real value of the land, and that the executor is insolvent. Assuming all this to be true, it would not justify an injunction, which if perpetuated, would in effect amount to a recision of the contract for sale with Davidson. The executor had power to sell under the will; it may be that he acted wrongfully in making the sale in 1863, and that he is personally liable; but it is not charged that Davidson was in collusion with him or was privy to any fraud; and he is not bound to see to the application of the purchase-money. If by reason of the insolvency of the executor, there will be risk in his receiving the purchase-money, relief against that can be had in the Probate Court. By the Acts of 1866–'67, and the rules established by the decisions of this Court in relation to contracts payable in Confederate money, the executor is entitled to recover of Davidson the value of the lot, and is chargeable with that value in the statement of his account. The plaintiffs can have full relief in the Probate Court, and their action should have been dismissed.

PER CURIAM. Bill dismissed.

(455) WILLIAM FALLS *v.* ROBERT F. GAMBLE.

1. No estoppel of record is created against one not a party to the record, even though he had instigated the trespass, on account of which the action was brought, aided in the defence of the action, employed counsel, introduced his deeds in evidence and paid the costs, and though he and the present defendant claimed by deeds under the present trespasser.
2. The principle of estoppel by record, by which an end is put to litigation, and parties and privies are concluded, and cannot be heard to make averment contrary to the finding of a jury, fixed by judgment in regard to a fact precisely put in issue, underlies and is acted upon in all modes of procedure, and while under our present system the complaint and answer are usually so diffuse that an issue is seldom joined, with a precision, which is required to work an estoppel; yet when the complaint avers title in the plantiff, the answer admits possession, denies the title of the plaintiff, and sets up title in the defendant, a verdict and judgment will conclude the parties and privies in respect to the title as completely as a verdict and judgment in the old action of trespass *quere clausum fregit* where the only plea was *liberum tenementum.*
3. The action for land under the C. C. P. differs, in this respect, from the old action of ejectment, in which the parties are charged and there is no estoppel because of the generality of the pleading in this: in an action for land the defendant, if he does not intend that his action shall try the title, should merely allege that he is entitled to the possession, and that the defendant withholds it, and so, if the defendant does not wish the title concluded by the action, should merely deny the allegations in the complaint so as to make his answer, in effect a plea of "not guilty."
4. Entries of ages of pupils as shown by a Common School Register, while not admisible to prove the ages, is yet competent as an independent circumstance to corroborate the testimony of a witness as to age.

The cases of *Fry* v. *Ramsour*, at this Term, and *Branch* v. *Goddin*, 2 Winst., s. 105, cited and approved.

This was a civil action tried before His Honor, Judge Logan, and a jury, at Fall Term, 1871, of Gaston Superior Court.

The action was brought to recover land.

The plaintiff offered in evidence a deed made to him by one D. P. Morrow, dated January 13, 1869, and also a deed from said Morrow to defendant dated October 8, 1858, (456) both covering the land in dispute.

The plaintiff then offered evidence tending to show that said Morrow when he executed his deed to defendant was an infant, and in support of this view introduced as a witness one John Morrow, who testified that an entry in the family Bible was in the handwriting of the father of witness, and said D. P. Morrow, and from that entry it appeared that D. P. Morrow was born 13th of January, 1848. He also

testified that he and D. P. Morrow went to a common school kept by one Love, who required the ages of his pupils to be given in; that he informed his father of this requirement, and that his father told him to get the ages out of the Bible they were using at school, and that Love took down their ages and inserted them in his register, as he gave them out of the Bible.

In reply to the evidence in behalf of the defendant tending to impeach this witness, the plaintiff offered in evidence the common school register, and one J. S. Oates as witness; Oates testified that such register was required to be kept by the School Law, and that blank books had been furnished by the State. The first entry in the register was for the year 1858, and was that in the handwriting of said Love, who had preceded him as teacher, and who was then dead; that the entry by Love in the register for 1858, in the column headed "Ages of pupils," and placed opposite to the name of D. P. Morrow was the figure "10"; that how he (Love) had obtained the age of D. P. Morrow, he did not know. This evidence was admitted after objection. This witness further testified that he succeeded Love as teacher in the school, and that the entry in the register for 1859 (August), as kept by himself as to D. P. Morrow, was "11"; that he could not tell how he had obtained the age of D. P. Morrow, but it was his usual custom to get the ages from the pupils, or their parents, and that he must have obtained it in one of these ways. This evidence was admitted after objection.

There was other evidence touching the age of D.
(457) P. Morrow, admitted after objection, but as it is not noticed in the opinion, it is presumed the points were abandoned.

The defendant offered in evidence, in support of his answer to that effect, the record of a suit tried in the same Court, at Fall Term, 1869, wherein the present defendant was plaintiff, and John Morrow and said D. P. Morrow were defendants, the same being an action brought to recover damages for a trespass committed by the defendants on the land in dispute, and to prove by two of the jurors who sat on the trial of that suit, that the present plaintiff instigated the trespass then complained of, aided in defending that suit, employed counsel, and that his deed of 13th January, 1869, was offered in evidence therein, that the same question under investigation in the present action, was tried in that

action, and that the only point tried by the jury was whether the deed made by D. P. Morrow to the defendant (then plaintiff), Gamble, was made when said Morrow was an infant, and that the verdict decided that he was *not* an infant, and that the deed passed title. It was admitted by the plaintiff, who testified that he had commanded the trespass complained of in the former suit, that he employed counsel, paid the costs of the suit, and that his own deed was affirmed in evidence for the defendants in said suit. This evidence was objected to by the plaintiff, and excluded by His Honor.

In the former action there was a verdict for the then plaintiff (now defendant) Gamble, and it appeared that the turning point of both suits, was whether D. P. Morrow was of age when he made the deed to Gamble, October 6th, 1868.

There was a verdict and judgment for the plaintiff, and appeal by defendant.

Schenck (with whom was *Bailey*), for appellant.

The finding of a *precise fact*, material to the question, is conclusive by estoppel betwen the parties and pri-
(458) vies. *Rogers* v. *Ratcliff*, 3 Jones, 225, and cases then cited.

The record in *Gamble* v. *Falls*, was competent to show that the "infancy" was passed upon in that suit. *Long* v. *Baugus*, 2 Ire., 290, and if the record did not show this issue, it was competent to prove it by parol testimony, *Wood* v. *Jackson*, 8 Wendell N. Y. Rep., p. 9; *Lawrence* v. *Hunt*, 10 Wend., p. 80; *Stokes* v. *Fraley*, 5 Jon , 377.

Estoppel by record, is conclusive when pleaded in bar. *Woodhouse* v. *Williams*, 3 Dev., 508.

It is not necessary for "infancy" to have been the only issue, but one of the material issues. Smith's leading cases, p. 443, Marg.

It is not necessary for the parties estopped to be parties to record; notice and opportunity to defend is sufficient. *McKesson* v. *Mendenhall*, 64 N. C. R., 505.

If the former suit was substantially the suit of the party sought to be estopped, it is sufficient. *Kennisley* v. *Orpe*, 2 Doug., 517, which is a parallel case.

Landlord has the right to become a party, when his tenant is sued, and is therefore bound by the record, if he has notice, in this he differs from a vendor who is not bound; *Martin*

v. *Cowles*, 2 D. & B., 101, does not apply to landlords; more especially are they now, as they, both vendor and landlord, may now be made parties. C. C. P., sec. 61; 19 Ark. Rep., 470. See *Chirac* v. *Reinecker*, , 2 Wheaton, 280; Bullers' N. P., p. 232.

The case of *Locke* v. *Norbowne*, 3 Mod. R., p. 141, is distinguishable because the "subject matter" in controversy was not the same—the other tenant could not be made a party.

See also notes to Duchess Kingston's case. Smith's Leading Cases, 417; *Foster* v. *Earl Derby*, 1 A. & E.,783. Where the closes in controversy were not the same.

The doctrine that the purchase must be after the judgment only applies where there is a different subject matter, or different "closes" in controversy. *Locke* v. *Norbowne; Foster* v. *Earl Derby*, *supra.*

School Register is inadmissable, because it was not
(459) the official duty of the teacher to make the entries.
Starkie, p 243, (therein differs from *Jacock* v. *Gilliam*, 3 Mur.); Rev. Code, ch. 66; Acts 1857–'58, ch. —, amending the school laws.

The entries by Oates were not introduced to confirm John Morrow. His entries not admissible because he is living, the entries are not against his interest. *Peck* v. *Gilmer*, 4 D. & B., 249.

It is submitted on the authority of *McKesson* v. *Mendenhall*, *supra*, that of D. P. Morrow being an action against Falls, for the damages recovered by Gamble against him in the former action that the judgment in that case would be an estoppel.

Hoke and *Bynum*, for appellant.

1. The judgment in *Gamble* v. *Morrow*, is *no estoppel* in this action, for it is "*res inter alios acta.*" *Andrews* v. *Blackmer*, 6 Hill, 324; *Martin* v. *Bull*, 13 S. & R., 441 and 443.

Estoppel proceeds upon the ground that an obligor is concluded at law, by his own admissions under seal, in the instrument against which the objection is alleged. 2 Am. Lead. Cases, p. 164, note.

The judgment in *Gamble* v. *Morrow*, is no bar in this action. Falls, in that action, had no day in the Court; he could not cross-examine or introduce witnesses, plead or appeal. C.

C. P., secs. 61 and 62. The essential difference of the two actions is to be observed. In the one the complaint is injury to the possession, and the judgment is for damages for injury; in the other the complaint is for title and possession, and judgment is for both. The essential issues are wholly different, as are the verdicts and judgments.

If Gamble had sued Falls and recovered upon the title, and then Morrow, claiming under Falls as tenant, had sued Gamble, the former recovery would probably be a bar, for he claiming under another, who has had his day in Court and is estopped. But this is not our case. Here Falls is (460) relying upon and arresting his own title adversely, not only to Gamble, but Morrow and the ward. There is no such privity of estate here, in the sense of the books, as to make the former action a bar to this. If so, land would be the most insecure of all property in this State.

The bar claimed here is waived by the pleadings. *Ransom* v. *McClees*, 64 N. C. R., 17; *Harkey* v. *Houston*, N. C. R., 137.

2. The several questions of evidence as to the birth, age, etc., are clearly settled. 1st Greenleaf Evidence, secs. 104, 105, 106.

As to entries officially and otherwise by these parties. See secs. 114, 116, same work. *Moffit* v. *Witherspoon*, 10 Iredell, 185; School Law, *Bland* v. *Warren*, 65 N. C. R., 372; *Wiseman* v. *Cornish*, 8 Jones, 218; *Clement* v. *Heartt*, 1 Jones, 400.

3. The declarations of a vender, after sale, are not evidence against his vender as to title. *Williams* v. *Clayton*, 7 Ired., 442; *Ward* v. *Saunders*, 6 Iredell, 382, and many other cases.

If, therefore, Morrow's declarations, subsequent to sale, are not evidence against Falls, a judgment against Morrow, at suit of Gamble, would not be evidence.

PEARSON, C. J. Both parties claim under David P. Morrow, so by the general rule, neither can deny the fact, that the title was at one time in him, and the question is, did the deed of David P. Morrow, dated January 13th, 1869, pass the title to the plaintiff?

The defendant, "by way of plea," relies upon an estoppel of record, and avers that the title of plaintiff derived under this deed, has been passed on, and judicially found to be of no force or legal effect, and to support this position, offered

to put in evidence the record of an action tried at Fall Term, 1869, in which he was a plaintiff, and John and David P. Morrow were defendants, for a trespass committed by them on the land in dispute; the answer in that action admits the trespass, and avers by way of defense that David P.
(461) Morrow was under the age of 21 years at the time he executed the deed to the plaintiff, (Gamble) 5th October, 1868, and was of the age of 21 years when he executed the deed to Falls, 18th of January, 1869, and that the defendants committed the alleged trespass as tenants of Falls, and justify under his title, so the title of Falls was doubly at issue.

The jury find all the issues in favor of plaintiff (Gamble,) and there was judgment. The defendant further offered to prove that Falls, the plaintiff in this action, instigated the defendant in the first action to commit the trespass, aided in defending the action, employed counsel and paid the costs, and the deed of David P. Morrow to Falls was read in evidence on the trial.

His Honor being of opinion that the record, in conjunction with the other facts offered to be proved, did not create an estoppel on Falls, rejected the evidence. This is the main question in the case.

We concur with His Honor in the opinion that the record in conjunction with the facts outside of the record, showing the participation of Falls in respect to the action, did not create an estoppel, and conclude him from relying, in this action, upon the title derived under the deed of David P. Morrow to him 15th January, 1869.

The issue upon which a case turns is not as distinctly exhibited on the record, by the complaint, answer and replication under the Code of Civil Procedure, as it is by the declaration, plea, replication "by way of traverse," and the *similiter* under the old mode of pleading.

But after consideration, we do not give our assent to the proposition of Mr. Bynum, that under C. C. P. "the issue is so covered over and mixed up," as to put certainty of pleading out of the question, and therefore there cannot, under C. C. P. be an estoppel of record.

Our conclusion is, that if in an action for injury to land, the defendant by his answer avers title in himself, admits the alleged trespass, and the right of the plaintiff to have
(462) judgment, (that is, gives color, as the books call it,) un-

less the defendant shows a good title in himself, the verdict and judgment create an estoppel in respect to the title of the defendant so put directly at issue, by the record, in the same way as the plea "*liberum tenementum*" in an action, "*trespass quare clausum*" did under the old mode of pleading.

The principle of estoppel of record, by which an end is put to litigation, and parties and privies are concluded, and cannot be heard to make an averment, contrary to the finding of a jury fixed by judgment, in regard to the fact, precisely put in issue—underlies and is acted upon in all modes of procedure. True, under C. C. P., the complaint and answer are usually so diffuse that an issue is seldom joined, with the precision which is required to work an estoppel, but whenever there is the requisite precision, the record concludes both of the parties and their privies. Had Gamble brought his action against Falls for trespass on the land, and Falls in his answer had admitted the possession of Gamble, and the committing of the alleged trespass by his orders, and put the defense on his title, under the deed of Morrow, January 13th, 1869, a verdict and judgment would have worked an estoppel in the same way it would have done in the old action "*trespass quere clausum*," under the plea "*liberum tenementum*." Indeed, under C. C. P., in an action for land, where the complaint avers title in the plaintiff, the answer admits possession, denies the title of the plaintiff, and sets up title in the defendant, a verdict and judgment will conclude the parties and privies in respect to the title. So the action for land under C. C. P., differs in this respect from an ejectment, where there is no bar—as the parties are changed—and no estoppel, because of the generality of the pleading. In an action for land, the plaintiff, if he does not wish the action to try title, should merely allege that he is entitled to the possession, and that the defendant withholds it, to his damage—and the defendant, if he does not wish the action to conclude the
(463) title, should, in his answer, merely deny the allegations of the complaint, so as to make it in effect a plea of "not guilty," or the "gen. issue." See *Harkey* v. *Houston*, 64 N. C.

Mr. Bynum, on the argument, assumed that the judgment in *Gamble* v. *Morrow*, is set up in the answer as a bar to the present action, like a plea of former judgment between the same parties for the same cause of action. If the first action had been *Gamble* v. *Falls*, the judgment would have been a

bar to this action, for the cause of action is not the same. In this, it is for the land; in that, it was for an injury to the possession.

But he was mistaken in that view, for the defense is not put on the idea of a bar to the second action, but is an estoppel of record in respect to the title of Falls—and as we have seen, the verdict and judgment would have worked an estoppel of record if Falls had been a party defendant in the first action. but Falls was not a party to the first action, and we have the question: Is he estopped as a privy of David P. Morrow?

There are privies in blood, as the heir privies in estate, the particular tenant and remainderman and reversioner, and privies in law as feoffer and feoffee. In the general sense, all who derive title from, or claim under, another are his privies, and are bound by the estoppels and conditions annexed to the estate at the time it rested. Gamble and Falls are both privies of David P. Morrow, as both claim title under him, and by the general rule are concluded, as to the fact that the title was at one time in him. See *Frey* v. *Ramsour*, at this Term, but the estoppel now set up against Falls is not that arising out of the deed of Morrow, but one growing out of the verdict and judgment in the action which Gamble afterwards brought against John and David P. Morrow, and, in respect to that, it is the same as if the action had been against William Orpe, if he, instead of the Morrows, had committed trespass by the command of Falls. Simplify the question by disconnecting it from the fact that both *Falls and Gam-*

(464) *ble* claim under David P. Morrow in respect to the deeds, and substitute William Orpe as defendant in the first action, and there is no ground upon which Falls can be made a privy of record, he does not claim under him. On the contrary Orpe is a tenant of Falls, and acted by his orders in committing the trespass; so Falls is not a privy, in the legal signification of the term, but he is an accessory before and after the fact, instigating, aiding and abetting the alleged trespass. Falls might have made himself a party of record as landlord, but he would have been at the disadvantage of stepping into the shoes of his tenant; on the other hand, Gamble might have made Falls a defendant. This he did not see proper to do; so Falls is not a party, or a privy, of record, he is but an accessory.

The defendant says, true, Falls is not a privy of record, but he instigated Orpe to commit the trespass, aided in the defense

of the action, employed counsel and paid the cost, and Orpe read the title deed of Falls in evidence on the trial. Take all this to be so: how can these matters dehors constitute him a party or a privy so as to work an estoppel of record? If this be so, Falls would lose his title, not by record or by deed, but by parol evidence, a thing never before heard of, except in one case, *Kennersly* v. *Orpe*, 2 Douglass, 517, on which case Lord Ellenburgh comments in this wise in *Outram* v *Morewood*. 3 East, 366:

"As to the case of *Kennersly* v. *Orpe*, it is extraordinary that it ever should for a moment have been supposed that there could ever be an estoppel in such a case, &c."

Mr. Bynum on the argument showed the unfairness of treating Falls as a party or privy of record, admitting him to have been an accessory before and at the fact, by this proposition, which was not met and cannot be met. After Falls took the deed from him, the declarations or admissions of Morrow were not admissable in evidence against Falls—how then can Falls be concluded by a verdict and judgment, afterwards rendered against Morrow which may have been
(465) based upon the declarations and admissions of Morrow after he executed the deed to Falls, who was not party to the action, although conducting it from the outside, he could not be recognized by the Court and had no right of appeal or otherwise? One who conducts a suit as guardian of an infant is not estopped by the record, for he is not a party. *Branch* v. *Goddin*, 2 Winston, 106.

The evidence in regard to the entries on the school register was competent. These entries were not offered to prove the truth of the facts therein set out, but merely as independent circumstances tending to corroborate the witness, John Morrow. The evidence rests on the same principle, that although a record is not evidence to prove the truth of the facts therein set out, except between parties and privies, yet when the mere existence of such record is material to be proved, it is evidence of that fact against every one, and the rule "*res inter alios acta*" has no application. So here the mere existence of the fact, that the figures 10 and 11 were entered on the school register by the teachers of the respective years, is evidence, not to prove the truth of the entries, but to show that in point of fact such entries were made *ante litem motan*.

No error.

PER CURIAM. Judgment affirmed.

(466) N. H. FREY *v.* A. L. RAMSOUR.

1. When the legal estate in land is not conveyed, a trust cannot be raised by parol, even founded on a valuable consideration and though followed by actual occupancy and the erection of valuable improvements.
2. One claiming under a deed is not estopped by it, to show that his bargainor did not have title at a time anterior to the delivery of his deed.
3. No estoppel arising from the Sheriff's deed is fed by an after-acquired interest—hence when A has no title to land when sold under execution as his property, so that nothing passed at the time by such deed, one who afterwards takes a deed from the defendant in such execution is not estopped to show that in fact his vendor had no title at the date of the execution sale.
4. Neither is such second vendee estopped to show want of title, as above stated, by any rule of practice; as the rule that when both parties claim under the same person neither shall be permitted to deny his title, has been adopted for the purpose of aiding the administration of justice by dispensing with the necessity of requiring the proof of original grants and mesne conveyances, and after the rule has effected this purpose it is *functus officio*, and the matter is then open in regard to the title, subject to the doctrine of estoppel and such other principles as may be applicable.

The cases of *Newlin* v. *Osborn*, 2 Jones, 164, and *Shelton* v. *Shelton*, 5 Jones Eq., 292, cited and approved and the latter distinguished from the principal case.

This was a civil action, brought by the plaintiff as purchaser at execution sale, against one Miller, to try the title to real estate, and was tried before His Honor, Judge Mitchell, and a jury, at Fall Term, 1870, of the Superior Court of Caldwell.

The facts are stated in the opinion with sufficient precision to supercede the necessity of a separate report.

There was a verdict and judgment below for the defendant and the plaintiff appealed.

Folk, for the apellant.

(467) Where both parties claim under the same person, neither shall deny the title of such person. This rule is not based on the idea of an estoppel but is a rule of practice which has become a rule of law. One exception is made to this rule: "when the defendant can show that the true title was in a third person and he has acquired that title or can connect himself with such third person." *Newlin* v. *Osborne*, 3 Jones, 164. In this case, the defendant insists that he may also avoid the rule by showing the title in himself at the time he took the deed from Miller.

A defendant may devise to avoid the rule three ways:

1st. By showing the true title was in a third person, and he has acquired such title.

2d. By showing the true title was in himself at the time he took the deed from the person under whom both parties claim.

3d. By showing the true title in a third person, without connecting himself with such person.

The first has been considered the only exception to the rule; if the second is also added the exceptions would become broader than the rule, and destroy it as a rule. The defendant had the benefit of the rule, and could estop the plaintiff from denying the title of Miller. When he is cornered, shall he be allowed to turn around and say, I am entitled to the verdict, any way, for the truth is, I had the true title at the time I took my deed from our common grantor. "No man shall play open and shut." *Armfield* v. *Moore*, Busbee, 157. If it be said, it would be hard to deny the defendant this right, the reply is: The title of a third person is the *tabula in naufragio* for which the law allows both parties to struggle, but it shall be accounted the folly of the defendant that he accepted a deed from my grantor when he had the title in himself; and he cannot complain because a rule of law is not violated to prevent mischief to him. If two joint tenants be seized of an estate in fee, the one grants a rent charge of that which belongeth to him and dies, the survivor shall hold the land discharged. And the cause is, that he which surviveth, claimeth, and hath the land by survivorship, *i. e.*, under the original feoffment. But if there be (468) two joint tenants in fee, and the one granteth a rent charge out of his part, and after releaseth to his joint companion and dieth, he shall hold the land charged forever. Thom. Coke, vol. 1, p. 747 and 50. Had the survivor not accepted the release he might have relied on the better title in himself and avoided the rent under the original feoffment. But, because he accepted the deed from his co-joint tenant, he was estopped to show such better title in himself. The principal case is stronger than the above case.

1. In the case from Coke, one claimed the land, the other a rent issuing out of the land; here, both claim the land.

2. In the case cited, the joint tenant which released had an interest, which determined at his death; and generally where an interest passes, the deed creates no estoppel.

3. The title of the survivor was not consummate until the death of the co-tenant.

It was error to say there was no evidence that Miller had an interest liable to execution. There was evidence that defendant had declared a trust for Miller of one-third of the mill. At common law it was not necessary that a trust should be declared in any particular way; the declaration could be made by deed, writing or word of mouth. PEARSON, C. J., *arguendo*, *Shelton* v. *Shelton*, 5 Jones Equity, 292. But admitting "that declarations by words are only theoretically allowable." RODMAN, Judge, in *Fergerson* v. *Haas*, 64 N. C., p. 772. Here are two circumstances, besides the declaration of the defendant; "his interest is a third," viz.: acceptance of the deed and being in continued possession.

Armfield, for the appellee.

Estoppels must be mutual and bind only parties and privies, and whoso is not bound by an estoppel cannot take advantage of it. *Griffin* v. *Richardson*, 11 Ired., 439; *Langston* v. *McKinnie*, 2 Murp., 67; *Gray* v. *Harrison*, 2 Hay., 292, (477).

(469) PEARSON, C. J. One Seth Moir conveyed the land to Ramsour, May 7th, 1857. So we have the defendant Ramsour as a starting point. In 1858, one Miller and Ramsour agreed by parol that Miller should have one third of the land in fee, at the price of $425, which Miller paid. He and Ramsour then occupied jointly, erected a mill, and made other improvements. In October, 1868, Ramsour and Miller agreed by parol, that Ramsour should have Miller's interest in the land, in exchange for another tract of land and $600 in money; a deed was made for the land and the money was paid. In August, 1869, the Sheriff, under an execution against Miller, sold his undivided third interest in the land.

The plaintiff was purchaser, and took the Sheriff's deed. In October, 1869, Miller executed a deed to Ramsour for his interest in the land, and the deed, as also the deed given for the land taken in exchange, was antedated, so as to make the date October, 1868, when the verbal agreement was made, and not October, 1869, on which date the deeds were executed.

The main question is, upon this state of facts did Miller in August, 1869, have an estate, interest or trust, which could

be sold, under execution by the Sheriff, the question of fraud against creditors being put out of the case?

Mr. Folk took the position, that the verbal agreement made by Ramsour and Miller in 1858, in pursuance of which the price, $425, was paid, and the subsequent occupation and enjoyment by Miller, vested in him a trust estate, in regard to one undivided third part of the land, notwithstanding the fact that the agreement was merely verbal. For this he relied on *Shelton* v. *Shelton*, 5 Jones Eq., 292.

Taking this to be so, the verbal agreement of Miller and Ramsour, in 1868, by which, in consideration of a tract of land and of $600 in money, which was executed on the part of Ramsour, Miller agreed to surrender, or extinguish, or convey back his trust estate, would have a like effect, so Miller had no trust estate, at the date of the Sheriff's sale, in August, 1869.

But *Shelton* v. *Shelton*, does not support the position
(470) that a trust estate can be created by a mere verbal agreement.

At common law, a use or trust might be created in these modes: By bargain and sale for valuable consideration, which by Statute 27th, Henry 8, in regard to freehold estates, must be by deed indented and enrolled; by covenant to stand seized for good consideration, and by passing the legal estate to a third person; by feoffment, fine, or recovery, and a declaration of the use, which declaration may be made at the same time, or may, under a power of appointment, be afterwards made by the feoffee, or to any third person to whom the power is given, and such declaration of a use or trust might be made by the feoffor at the time of the feoffment, by parol, for the feoffment passed the legal estate, and the only question was, shall the feoffment enure to the use of the feoffee, or of the feoffer, or of some third person in whose favor the use is declared? *Shelton* v. *Shelton* decides that in the absence of any statutory provision, when the title is passed to a third person, a declaration of a use or trust may be by parol; but here we have a case, when one, without passing the legal estate, agrees by parol for valuable consideration, that he will stand seized in trust for another: in other words, he bargains and sells by parol one-third interest in the land. This cannot be done, and *Shelton* v. *Shelton* has no application.

In the second place, it is insisted by plaintiff's counsel, that the deed from Miller to Ramsour, although dated 1868,

was, in fact, delivered and took effect October, 1869, and Ramsour is estopped by this deed from denying that Miller had, in August, 1869, a legal or trust estate, which was liable to sale under execution; for, says he, both parties claim under Miller, and neither of them can deny title in him.

My Lord Coke says, "the doctrine of estoppel is a most curious and cunning learning." We are pleased to acknowledge the efficient aid rendered to us by the reflective and learned research of Mr. Folk and Mr. Armfield, in de-
(471) ciding the question of estoppel in the new point of view in which it is presented. Should Miller die, leaving a widow, she may be entitled to dower in the land, because she is a privy, and against her Ramsour would be estopped, by accepting the deed, from denying that her husband was seized during coverture. As in the case cited by Mr. Folk from Coke's Littleton, if one joint tenant grants a rent charge, and afterwards by deed releases to the other joint tenant, who survives, he takes subject to the rent, although, but for the release he would have taken, discharged of the rent. 1 Thomas Coke, 747.

So if a disseisee be enfeoffed by disseissor, and the disseissor dieth, his wife shall be endowed by the disseisee, for he is estopped by the deed from denying the title of her husband. Otherwise, if the estate had come to the disseisee, by title of descent as heir of the disseisor, for in such case he cometh in, not by his own act but by act of the law, which worketh no estoppel, and he is remitted to his more ancient and better title. See Coke Lit.

So in respect to the claim of dower, it may be the misfortune of Ramsour, that instead of letting one parol agreement stand against the other, or taking a release setting out the facts, so as to fall under the rule "an estoppel against an estoppel leaveth the matter at large," he has accepted a deed which has the legal effect of an admission, as between parties and privies, that Miller was seized of the land in fee simple at the delivery of the deed October, 1869. We have seen that the widow of Mitchell would be a privy. The question is, can the plaintiff Frey, a purchaser at sheriff's sale, assume the relation of a privy either of Miller or of Ramsour, so, as "to shut Ramsour's mouth," and prevent him from averring that in point of fact, Miller did not in August, 1869, have any estate in the land liable to execution.

It is agreed that the title was at one time in Ramsour.

Suppose Ramsour is estopped by the deed which he accepted of Miller, from denying that the title was in Miller in (472) October, 1869, he does not, by accepting the deed, admit or aver as a fact that Miller had title in August, 1869, and when Frey falls back upon the doctrine of estoppel, Ramsour says, I admit that Miller had title in October, 1869, and as a matter of course, you took nothing by the Sheriff's deed in August, 1869.

Thus it is seen, there can be no estoppel, as between Frey and Ramsour, for the deeds under which they claim take effect at different times, and they are not privies in any sense of the term, but avowed adversaries, and the only connection is, that they both claim title under Miller.

So the plaintiff is obliged to yield the position of "an estoppel by deed," and fall back upon the position, that by a rule of practice, "when both parties claim under the same person, neither shall deny the title of the person under whom both claim."

In *Newlin* v. *Osborne*, 2 Jones 164, after affirming the rule, "in ejectment the plaintiff must recover on the strength of his own title," this exception is admitted, with the explanation that it is not based on the idea of an estoppel, but "is a rule of practice whice has become a rule of law adopted by the Courts for the purpose of aiding the administration of justice, by dispensing with the necessity of requiring the plaintiff to prove the original grant and *mesne* conveyance (which in many cases it is out of his power to do) upon proof that the defendant claims under the same person." After the rule has effected this purpose, it is *functus officio*, and the matter is open then in regard to title, subject of course to the doctrine of estoppel, and such other principles of as may be applicable.

No error.

PER CURIAM. Judgment affirmed.

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(473) WILLIAM F. McKESSON *v.* NANCY HENNESSEE.

1. A bargainee in a quit claim deed has no legal claim for damages if the title proves defective, nor to enjoin an execution issued upon a judgment based upon the purchase-money.

2. In ascertaining the damages sustained by reason of an injunction under the C. C. P., reference must be had to the condition of the debt

enjoined; if by reason of the delay the judgment debtor has become insolvent, the whole debt would properly be included as damages sustained by it; if his pecuniary circumstances remained unaltered, no damages are sustained, except the costs and disbursements.

This was a civil action tried before His Honor, Judge Mitchell, and a jury, at Fall Term, 1871, of Burke Superior Court.

The plaintiff alleged in his complaint, that in 1860 he had purchased from the defendant a tract of land, executed his note for the purchase-money, and had taken a deed for the land, that defendant represented she had good title, and he believed that she had when he purchased, but he afterwards ascertained that she had no title, but that it was outstanding in one Avery and one Sudderth; and that he had purchased this outstanding title; that the defendant had sued on the note, obtained judgment, and was seeking by execution and supplementary proceedings to enforce its collection, and he prayed that an account might be taken of the amount of moneys expended by him to perfect the title, and that the same might be treated as an extinguishment in whole or part, according as it was ascertained, of said judgment, and in the meantime that the defendant might be enjoined from collecting judgment.

It appeared that the deed contained no covenants of warranty, but was a quit-claim in effect, and that the suit on plaintiff's note had been commenced since the adoption of the Code.

It is needless to notice the points made by the an-
(474) swer, as the opinion turns upon the case as stated by the plaintiff.

By consent two issues were submitted to the jury.

1. Did the defendant have title, and was she able to convey it, when the deed was executed?

2. If no, has the plaintiff, suffered any, and if any, what damages?

Under instructions from the Court, the jury found the first issue in favor of the plaintiff; and on the second issue, that the plaintiff had not suffered any damages.

Thereupon the plaintiff moved for a perpetual injunction, which was refused.

The defendant thereupon moved to vacate the order of injunction theretofore obtained, and also for judgment against the sureties on the injunction, undertaking for the whole

amount of the judgment enjoined, and for the costs of this action.

The plaintiff then suggested that there should be a reference, or an issue, submitted to a jury, to ascertain the amount of the damages which the defendant had sustained; but His Honor allowed the motion of the defendant, and gave judgment accordingly, and the plaintiff appealed.

Busbee & Busbee, Folk and Armfield, for the appellant, filed the following brief:

I. The injunction was improvidently dissolved, *Britain* v. *McLean*, 6 Ire. Eq., 165; *Kindley* v. *Gray*, *Ib.*, 445; *Cox* v. *Jerman*, *Ib.*, 526; Hilliard on Vendor, 489, *et seq.*

II. And surely the Judge could not give judgment on the injunction bond for the whole amount of the damages. C. C. P., secs. 192, 333.

Cited and distinguished: Rev. Code, ch. 32, sec. 17, *Emmons* v. *McKesson*, 5 Jones' Eq., 92. (In illustration, N. Y. practice, Vorhees' Code, 408, 409. Not quoted as authority in accordance with the ruling in this Court.) Referred (475) to the practice in *Thompson* v. *McNair*, 64 N. C., 448.

The remedy for the defendant upon dissolution of injunction is by action on the plaintiff's injunction bond or undertaking. 1 Whitaker's Practice, 484.

Furches and *Phillips & Merrimon*, for the appellee.

1. A purchaser of land, who has taken a deed for the same, is on a different footing. That he can then only rescind the contract upon the ground of fraud—*Clantern* v. *Burges*, 2nd Dev. Eq., 13

2. He must then rely upon his covenants. *Ibid.*

3. But if a purchaser of a defective title, purchases the outstanding claims so as to perfect the same, he may compel the vendor of the defective title to repay what he has had to pay out. See *Ramseur* v. *Shuler*, 2 Jones' Eq., 487, and *Westall* v. *Austin*, 5 Ire. Eq., 1.

Plaintiff is entitled to judgment upon injunction bond. See *Emmons* v. *McKesson*, 5 Jones' Eq., 92. Code of Civil Procedure, p. 68, sec. 192, does not change the rule in this case, and the Court declares for the judgment, &c.

PEARSON, C. J. The complaint and answer both treat the deed of Nancy Hennessee to McKesson as a conveyance and not as an executory agreement to make title. It follows, there being no warranty or covenant of seizing, that the claim which the plaintiff seeks to set up has nothing to rest on. The legal effect of the deed was a quit-claim or release by way of extinguishment, and the finding of the jury was upon matter immaterial.

The plaintiff was entitled, upon the *undertaking* of the plaintiff, to have judgment against him and his sureties for the costs, but not for the debt and interest. In this respect the C. C. P. has made a marked departure from the old practice, as well in regard to injunctions as in regard to
(476) appeals. The undertaking is to pay such damages as the defendant may sustain by reason of the injunction. The damages may be ascertained by a referee, or otherwise as the Judge shall direct. The costs would be included as a matter of course, but how far the defendant has sustained further damage by reason of the injunction, depends on the circumstances. If the plaintiff was solvent at the time of taking the injunction, and by reason of the delay becomes insolvent, the whole debt would properly be included as damages sustained by reason of the injunction, but if the plaintiff's condition was no better, or no worse, at the end of the litigation than at the beginning, the defendant has sustained no damage by reason of the injunction, except costs and disbursements.

There is error. Judgment reversed. This will be certified, to the end that the damages which the plaintiff has sustained, by reason of the injunction, may be ascertained by a referee, or by a jury, or by the Judge himself, in which event he will find the facts upon which his conclusions of law are based.

Each party will pay his own costs in this Court.

PER CURIAM. Error.

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(477) THOMAS L. HEMPHILL AND WIFE *et al v.* BENJAMIN A. ROSS.

1. Upon the execution of a mortgage, the mortgagor becomes the *equitable* and the mortgagee the *legal* owner, and this relative situation remains until the mortgage is redeemed or foreclosed.

2. Until the day of redemption be past, the mortgagor has a legal right, and after, an equity of redemption.
3. A mortgagor allowed to remain in possession by the long acquiesence and implied approval of the mortgagee, is not a trespasser, but a permissive occupant, and as such is entitled to reasonable demand to terminate the implied license before an action can be brought to recover possession.
4. A purchaser of the mortgagor's estate under execution and (where he has leased,) his lessee are entitled to the right of the mortgagor.

The cases of *McKeeson* v. *Harshaw*, 65 N. C., 688; *Harshaw's Ex'rs* v. *McKesson*, at this Term, and *Hemphill* v. *Giles*, at this Term, cited and approved.

This was a civil action tried at Fall Term, 1871, of Burke Superior Court, before His Honor, Judge Mitchell, and a jury.

The action was brought to recover possession of land, and the following facts were developed on the trial:

That one W. F. McKesson formerly owned the land, and on the 5th day of February, 1869, conveyed the same to one Jacob Harshaw, to secure certain notes given for money lent by said Harshaw.

The money secured to be paid by the mortgage was to be paid by the terms of the mortgage in installments of 3, 4 and 5 years. No payment had been made on any of the notes so secured. Harshaw was dead and the plaintiffs are the devisees of his interest in the mortgaged property.

It was also in evidence that W. F. McKesson had been allowed by the mortgagee to remain in possession, and that his estate had been sold at execution sale and purchased by C. F. McKesson, who had leased the premises to the (478) defendant, and that the defendant had not received any notice to quit, and no demand for possession had been made on him.

There were other matters shown, but not material to a correct understanding of the case.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Battle & Sons, for plaintiffs.
Busbee & Busbee, *Folk* and *Armfield*, for defendant.

I. Both mortgage and covenants contain a stipulation that in case the mortgage money was paid in three, four and five years in equal installments, no suit was to be brought either

for the land or for the debt. Now this is equivalent to a proviso that the mortgagor shall enjoy the land from the delivery of the mortgage, and covenant until the expiration of five years, and constituted the mortgagor tenant for years to the mortgagee. It was such a vested legal interest as might be sold by the mortgagor, at his death would have vested in his executors administrators, which consequently passed to C. F. McKesson, by virtue of the execution sale and Sheriff's deed. 1 Gr. Cruise, 572; *Powslay* v. *Blackman*, Cro. Jac., 659; Coote on Mort., 327, 360.

DICK, J. The mortgage executed by W. F. McKesson to Jacob Harshaw has given rise to much litigation, which might have been avoided if the terms of the mortgage had been more explicit, or the parties had better understood their relative legal and equitable rights.

Upon the execution of a mortgage the mortgagor becomes the equitable owner of the lands, and this relative situation remains until the land is redeemed, or the mortgage is foreclosed. Until the day of redemption is passed the mortgagor has no special equity, but he may pay the money according to the proviso, and avoid the conveyance at law,
(479) and this privilege is termed his legal right of redemption.

After the special day of payment has passed, the mortgagor still has an equity of redemption, until there is a foreclosure, and this right is regarded as a continuance of the old estate, and so long as he is permitted to remain in possession, he is considered to hold in respect to his ownership, and is not accountable for the rents and profits of the mortgaged lands. Adams' Eq., 114.

Mr. Coote, in his valuable work on mortgages, 319, says: "There is some obscurity in the books in what light the mortgagor during this period of actual possession, or receipt of the rents of the land, stands in respect to the mortgagee. The result of the cases, however, appears to be, that he may be considered as tenant for a term, or at will, or by sufferance, or a trespasser, according to circumstances."

In applying these principles of law, we will briefly consider the relative situation of the parties to the mortgage introduced in evidence, and the manner in which they have acted towards each other, so that we may ascertain the resulting rights of the parties to this action.

On the 5th day of February, 1867, William F. McKesson executed the mortgage to Jacob Harshaw to secure certain debts therein mentioned; and there is an express stipulation that the mortgage is to be void, if Mr. McKesson shall pay said debts in equal installments in 3, 4 and 5 years.

The acceptance of this mortgage raised an implied promise on the part of the mortgagee, that he would not sue on the notes secured, only as the several installments became due. *McKesson* v. *Harshaw*, 65 N. C., 688.

The mortgagee had no right to foreclose the mortgage until the day of redemption had passed.

Harshaw's Ex'rs v. *McKesson*, at this Term. Under these circumstances the mortgagor was permitted to remain in possession for several years, and he received the rents and profits of the land. The mortgagee had a right at
(480) any time, upon reasonable demand, to take possession of the mortgaged premises, for the better security of his debt, and by so doing he would have become liable to keep such premises in usual repair, and to account for the rents and profits received in a settlement of the mortgage debts.

It is not necessary for us in this case to determine with precision the position of the mortgagor in possession towards the mortgagee, as under the circumstances he was not a trespasser, but a permissive occupant holding possession by the long acquiesence and implied approval of the mortgagee, and as such was entitled to a reasonable demand to terminate this implied license before an action could be brought to recover possession. *Hemphill* v. *Giles*, at this Term, and authorities cited.

Charles F. McKesson purchased the legal right of redemption belonging to the mortgagor at execution sale, and the Sheriff's deed conveyed such estate to the purchaser and substituted him to the rights of the mortgagor.

The purchaser leased a part of the premises in dispute to the defendant, who is in possession, and is entitled to the rights of his lessor, to have a reasonable time after demand to deliver possession to the plaintiffs, who are the legal owners. As no demand was made, this action cannot be sustained.

There was error.

PER CURIAM. Case dismissed.

(481) WM. McCOMBS and another *v.* ALBERT WALLACE.

1. A bargainor in a deed in trust, containing a stipulation for the retention of the possession of the land conveyed, until sold under the terms of the trust, and who holds possession after a sale of the premises by a trustee is not such a tenant as comes within the purview of the Landlord and Tenant Act (Acts, 1868–'69, chap. 156) and hence proceedings cannot be taken under that act to evict him.

2. That act was only intended to apply to a case in which the tenant entered into possession under some contract of lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity, with some person who had so entered.

3. This construction excludes from the operation of the act two classes, viz.: vendees in possession under a contract for title and vendors retaining possession after a sale, though such persons are certainly tenants at will or sufferance for some purposes, and frequently so styled.

The case of *Jones* v. *Hill*, 64 N. C., 198, cited and approved.

This was a proceeding to recover possession of land, commenced by the plaintiff before A. H. Martin, Esq., a Justice of the Peace, brought by appeal to the Superior Court of Mecklenburg county and heard before His Honor, Judge Moore, at July Special Term, 1871.

The allegation of the plaintiffs, admitted to be true, was, that the defendant had executed a deed in trust to the plaintiff, Williams, providing for a sale of the land, if debts were not paid by a day named therein, and also providing as follows: "It is further the understanding and agreement of the parties, that the said party of the first part [the defendant] shall retain possession of said premises, until the same shall be sold by the said party of the second part," and that the debts not having been paid as stipulated, the trustee had sold the premises under the provisions of the trust and the other plaintiff, Robert, became the purchaser, and that the (482) defendant continued thereafter to retain possession of the same and had refused to surrender possession thereof to the plaintiff after demand.

His Honor, on this state of facts, being of opinion that the plaintiff had the right to recover under the proceedings, rendered judgment accordingly, from which the defendant appealed.

Vance & Dowd, for the appellant.
J. H. Wilson, for the appellee.

Rodman, J. The question in this case is not whether the

defendant is a tenant of the plaintiff, in any sense of that word; but whether he is such a tenant as is embraced within the Landlord and Tenant Act, 1868–'69, ch. 156, p. 355. Sec. 19, of that Act, says:

"Any tenant of lessee of any house or land, and the assigns under tenants or legal representatives, or legal representatiues of such tenants who shall hold over, and continue in the possession of the demised premise, or any part thereof, without permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed, in either of the following cases:

1. Whenever a tenant in possession of real estate holds over after his term has expired.

2. When the tenant or lessee, or other person under him, has done or omitted any act, by which, according to the stipulation of the lease, his estate ceased."

A Justice has jurisdiction only in the cases described in this section. The Act then prescribe the proceedings before the Justice.

Upon a careful consideration of this Act we think it was intended only to apply to a case in which the tenant entered into the possession under some contract, either actual or implied with the supposed landlord, or with some person
(483) under whom the supposed landlord claimed in privity, or when the tenant himself was in privity with some person who had so entered.

This construction would exclude two classes of cases, which we think were not intended to be embraced in the Act, viz.: Vendees entering into possession under a contract of purchase, and vendors continuing in possession under circumstances like the present. Such persons are certainly tenants at will or sufferance for many purposes, and they are frequently so called. *Jones* v. *Hill*, 64 N. C., 198. But they seem to be excluded as well by the words of the section above cited, as by the general scope and spirit of the Act. The words of the section clearly require that the entry should be under a demise of some sort, although there is no reason for saying that it must be for any definite term, it may well be at will.

In this case the possession of the defendant was not acquired from either the trustee or the plaintiff; there was nothing which can be called a demise; his possession arose

out of his own title, and continued until the sale, by virtue of the reservation in the trust to that. His term has not expired; he had no term, for that implies a term derived from some other person. The reservation was perhaps void, for a term of years cannot be reserved by the grantor of an estate in fee.

In that case the defendant would be a vendor continuing to hold the possession after his sale, which would also effectually exclude the idea of a demise

The case of such a tenant is not within the mischief which the Act was intended to remedy.

Let this opinion be certified.

PER CURIAM. Judgment reversed.

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(484) ALIPH DOZIER *et. al. v.* C. W. GRANDY and wife.

1. It is well settled that in descended estates, where the person last seized dies witbout leaving issue, or brother or sister of the blood of the first purchaser, but a half sister not of such blood, and remote collaterals of such blood, the inheritance shall descend upon such remote collaterals, rather than upon such half sister.

The cases of *Bell* v. *Dozier*, 1 Dev., 333, and *Lawrence* v. *Pitt*, 1 Jones, 344, cited and approved.

This was a civil action brought to try title to land, and was tried before His Honor, Judge Pool, and a jury, at Spring Term, 1871, of Currituck Superior Court:

The facts developed by the testimony were these:

About 1812 one Peter Barnard died seized of the land in question, having inherited the same from his father: said Peter left a widow who had dower assigned to her, married one Dozier, had issue a daughter, the *feme* defendant, and died; Peter left one son Jesse, upon whom the land descended as heir to Peter, and who died without issue, or brother or sister of the whole blood; that the plaintiffs are the nearest collateral kinsmen of the blood of the Barnards, &c.

Under instructions from His Honor, a verdict was rendered in favor of the plaintiffs, and the defendants appealed.

Bragg & Strong, for the plaintiffs, cited—

Bell v. *Dozier*, 1 Dev., 333; *Felton* v. *Billups*, 2 D. & B., 308; *University* v. *Brown*, 1 Ired., 388; *Burgwyn* v. *Devereux*, 1 Ired., 583, and *Wilkerson* v. *Bracken*, 2 Ired., 316.

Busbee & Busbee, for defendants.

BOYDEN, J. The very point raised in this case and in regard to the same estate, has heretofore been expressly adjudicated in this Court in the case of *Bell et. al.* v. *Dozier* (485) and wife, 1 Dev., 333, decided in 1827, Judge Henderson delivering the opinion of the Court.

And again in 1854, in the case of *Lawrence* v. *Pitt*, 1 Jones, 344, another question was made in relation to the title to this same inheritance, the opinion being delivered by Judge Battle.

In both these cases the question arose whether upon the death of Jesse Barnard, unmarried and without issue or brother or sister of the parental line, leaving half sister of the maternal line, the estate descended upon this half sister of the maternal line, or upon the heirs of Peter Barnard, the nearest collateral relation, who were of the blood of the first purchaser Peter Barnard, and in both cases this Court decided that the nearest collateral relations, who were of the blood of the first purchaser, were entitled to the inheritance, and not the half sister of Jesse.

In the first case the plaintiffs were the maternal half brothers and sisters of Peter Barnard, and the nearest of kin to Jesse, except Lydia, his half sister, who was not of the blood of the first purchaser.

In the cases of *Lawrence* v. *Pitt*, the same question was substantially made and decided in the same way. These two cases must govern this case, and we deem it sufficient to refer to those cases without further discussion.

There is no error.

PER CURIAM. Judgment affirmed.

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(486) BOND E. SEDBERRY *v.* THE BOARD OF COMMISSIONERS OF CHATHAM COUNTY.

1. Whether the General Assembly possesses the power to forbid the Board of Commissioners of a county to levy and collect a tax to pay an existing debt of the county, when such board is commanded to do so by the order of a Superior Court having jurisdiction of the matter, and whether in such case the board must take the responsibility of deciding this question so that, should the statute be held constitutional, the return would be responsive and sufficient—otherwise the persons composing the board subject themselves to fine and imprisonment for contempt, *quere*,

2. The Statute, however, of 1871, Acts of 1870–'71, chap. 114, forbidding the Board of Commissioners of Chatham county from levying or collecting any other tax except for the accruing current expenses of the county, is relieved from the imputation of being unconstitutional, for while forbidding the levying of a tax, the scope and effect of it is to empower the Board to raise the necessary amount to discharge the liabilities of the county outstanding at the time of the ratification of the act, by issuing and selling in the market coupon bonds, and a mandamus lies to compel the issuing and sale thereof to pay debts outstanding when the act was passed.

3. The general rule is that no return to a peremptory mandamus is sufficient except that it has been obeyed, but if a statute be enacted, after such peremptory order, forbidding obedience and making obedience impossible, such new matter will of necessity constitute a sufficient return, provided the statute is constitutional and within the law-making power.

4. Per PEARSON, C. J., *arguendo:* If the only proper construction of the statute is that the creditors of the county are put to the alternative of accepting coupon bonds, or be without remedy because the Board are forbidden to levy or collect any tax except for accruing current expenses of the county, thus making a direct conflict of power between the Judge of the Superior Court and the General Assembly as assumed by the counsel for each party, there would be much force in the objection that it impairs the obligation of contracts.

5. But this construction is too narrow and the one first indicated is the true one, not only as warranted by the terms of the act, but by the well settled principle governing the construction of statutes, namely, that where a statute admits of two constructions, one of which is consistent with the Constitution and the other is questionable as violative of good faith, and as tending to impair the obligation of contracts—in other words, if a thing may be done in a rightful way or in a
(487) wrongful way, it shall be presumed to have been done in the rightful way.

6. In this case, on the coming in of the return, setting forth the provisions of the statute under consideration, the Court below should have modified the order so as to require the Board to raise the money in the mode provided, for the Act, being constitutional, protected the Board from the charge of contempt.

7. Ordinarily the successful party is entitled to costs of this Court, but they are refused in this case for peculiar reasons.

The case of *State* v. *Jones*, 1 Ire., 414, cited and approved.

This was a mandamus, tried before His Honor, Judge Buxton, at Fall Term, 1871, of Cumberland Superior Court.

The plaintiff held a debt against the county of Chatham, due prior to and at the date of the passage of the Act, March 7th, 1871, Acts 1870–'71, ch. 114, p. 176, and obtained a peremptory mandamus against the defendants, commanding them to levy and collect a tax sufficient to pay his debt.

The peremptory mandamus issued from Fall Term, 1870, returnable to Spring Term, 1871, and the defendants having at that time failed to perform its commands, a rule was

granted against them to show cause why they should not be attached as for contempt.

At that term the defendants filed their answer to the rule, and relied upon the statute above stated, which, for the better understanding of the case, is given in the foot note.*

His Honor, deeming the return insufficient, ordered (488) an attachment to issue against the gentlemen composing the Board, from which order the Board appealed to this Court

B. & T. C. Fuller, for appellants.

I. The Judge erred in granting order to show cause. The plaintiff was entitled to proceed *as for contempt. Vide* Laws 1868–'69, p. 428, ch. 177. Sec. 4, p. 427, sec. 6. This falls under secs. 2, 8 and 9 of p. 428, 429.

II. The Commissioners had no power to levy the tax. Constitution, Art. V, secs. 1 and 7; for the power to tax—the subjects of taxation and the equation, see also *University R. R. Co.* v. *Holden*, 63 N. C. R., 410, the opinions of Pearson and Dick especially. And see *Winslow* v. *Com'rs of Perquimans*, 64 N. C. R., 218; *Pegram* v. *Com'rs of Cleveland*, 64 N. C. R.,

* "AN ACT AUTHORIZING THE COMMISSIONERS OF CHATHAM COUNTY TO ISSUE BONDS."

SECTION 1. *The General Assembly, &c., do enact:* The Commissioners of Chatham county are hereby authorized to issue coupon bonds, not exceeding in amount twelve thousand dollars, in denominations of not less than twenty dollars, and not more than five hundred dollars.

SEC. 2. That the said bonds shall not be issued to contract any new debts against the county, but to fund such liabilities of the county as are outstanding at the time of the ratification of this Act.

SEC. 3. These bonds shall bear interest at the rate of six per cent. per year payable annually, and that the coupons calling for such interest, shall be received by the sheriff in payment of county taxes.

SEC. 4. The principal of bonds so issued, shall be payable as follows: the first one fourth of the principal of said bonds at the expiration of one year from the first day of September, one thousand eight hundred and seventy one, and each succeeding like amount shall be payable in like manner at intervals of one year from the time of payment of the issue immediately preceeding it.

SEC. 5. That for the payment of the principal and interest of said bonds, the Commissioners of Chatham County are authorized to levy the necessary taxes as occasion may require from time to time, but they are forbidden to levy or collect any other tax, except for the accruing current expenses of the county.

SEC. 6. This Act shall be in force from and after its ratification.

Ratified the 7th day of March, A. D., 1871.

557; *Gooch* v. *Gregory*, 65 N. C. R., 142; *Lutterloh* v. *Com'rs of Cumberland*, *Ibid*, 403.

III. The Commissioners were forbidden by the Legislature to levy such a tax as the plaintiff demanded. See Acts 1870 and 1871, *State* v. *Jones*, 1 Ire., 414.

Court may review any intermediate order. C. C. P., p. 119, sec. 313 C. C. P., p. 92, sec. 249, as to the relief demanded.

John W. Hinsdale, for appellee.

(489) The defendants have no right to appeal. *Ex parte Biggs*, 64 N. C., 203.

These are proceedings of a criminal character, for the purpose of punishing a contempt of Court. They are, therefore, independent of, and distinct from the civil suit out of which they grow. The judgment or decree in that suit cannot be here reviewed, nor the regularity of the steps taken in that suit called in question. An irregularity cannot be taken advantage of collaterally. Cool. Const. Lim., 409; *Savage* v. *Hussey*, 3 Jones, 149.

If the writ of mandamus, which was served on the defendants, was a valid process, a disregard of it amounts to a contempt of Court, and is punishable by attachment. Tapping on Mandamus, 421, 422, and cases there cited. No return to a peremptory suit of mandamus, except a certificate of obedience, will be received. Tapping on Mandamus, 7, 48; 3 Bl. Com., 111; 3 Steph. Com., 684.

A wilful disobedience of any process or order, lawfully issued by any Court, is a contempt. Laws of 1868–'69, ch. 167.

The said writ was a valid process,

1. Because it issued from a Court which had jurisdiction, both of the subject matter and of the parties.

2. Because the judgment or order for mandamus was valid, not void. Irregularities in the course of judicial proceedings, do not render the judgment void. Cool. Const. Lim. 408, 409.

3. Because the said judgment has never been set aside, and until this is done it must be regared for all purposes as a subsisting and a regular judgment. *Winslow* v. *Anderson*, 3 D. & B. 9. See also *Savage* v. *Hussey*, 3 Jones 149.

4. When a writ from a Court of competent jurisdiction is delivered to a sheriff, he is bound to execute it without in-

quiring into the regularity of the proceedings on which the writ is grounded. *Cady* v. *Quinn*, 6 Ired. 191.

II. The question whether the Constitution of North Carolina establishing the equation of taxation does not
(490) prevent a county from providing for the payment of its debts existing when the Constitution was adopted, is *res adjudicata* so far as these defendants are concerned.

III. This question has been decided negatively by the Supreme Court of North Carolina, in the cases of *University R. R. Co.*, v. *Holden*, 63 N. C. 410, and *Pegram* v. *Commissioners of Cleveland County* 64 N. C. 557.

IV. The Act of the General Assembly of North Carolina, entitled "an act authorizing the Commissioners of Chatham county to issue bonds," laws of 1870–'71, p. 176, and ratified March 7, 1871, is unconstitutional and void.

1. It impairs the obligation of a contract. *Pegram* v. *Commissioners of Cleveland county*, 64 N. C. 557 *Gooch* v. *Gregory*, 65 N C. 142; *Sturgis* v. *Crowninfield*, 4 Wheat., 206; *Green* v. *Biddle*, 826; *Ogden* v. *Saunders*, *Ib.* 233; *Bronson* v. *Kinzie*, 1 How., 311; *McCracken* v. *Haywood*, 2 *Ib.*, 608; *Quackenbush* v. *Dawle*, 1 Comstock, N. Y. 129; *Jones* v. *Crittendon*, 1 Car. Law Rep., 385; *Barnes* v. *Barnes*, 366.

2. It divests a vested right. *Hawthorne* v. *Calif*, 2 Wall, 10; *Bronson* v. *Kenzie*, 1 How., 311; *Hoke* v. *Henderson*, 4 Dev. 15; *Dartmouth College* v. *Woodward*, 4 Wheat., 519; Cool. Cons. Lim., 353, 354, 362.

3. It deprives one of his property without due process of law. *Dartmouth College* v. *Woodward*,4 Wheat 519.

4. Its effect is to reverse a judgment of a Court. This is a judicial act. It therefore so far violates sec. ____ of the Constitution of North Carolina.

The defendants cannot take shelter behind a void act of the Legislature. The Constitution is the paramount law. They were commanded to act. They were obliged to obey. They were called on to decide upon the force of the law, and they disregarded the mandate of the Court at their peril. Cool. Con. Lim. 39, 41. "When a statute is adjudged to be unconstitutional, it is as if it never had been. Rights cannot be built up under it * * * It constitutes a
(491) protection to no one who has acted under it, and no one can be pnnished for having refused obedience to it before the decision was made. Cool. Con. Lim., 188. *Strong* v. *Daniel*, 5 Ired., 348. *Astrom* v. *Hammond*, 3 McLean, 107.

Meagher v. *Storey Co.*, 5 Nev. 244, *McKethan* v. *Terry*, 64 N. C.. 25.

A contempt of Court was likewise committed in refusing to obey the alias writ of mandamus. The summary attachment was proper. 3 Chit., Gen'l Prac. 605. *Tapping on Mandamus* 422, 424. *State* v. *Jones*, 1 Ired., 137.

But if the regularity of the proceedings in the suit may here be questioned, it is maintained that they have been in all respects regular.

The prayer of the complaint for a peremptory writ of mandamus in the first instance is proper. *Winston* v. *Commissioners of Perquimans county*, 64 N. C., 223; *Pegram* v. *Commissioners of Cleveland county*, *Ib.*, 557.

As the subject of mandamus has been overlooked by the law-makers, and has been left to judicial legislation, the Courts will be liberal in respect to forms used. The case of *Lutterloh* v. *Board of Commissioners of Cumberland county*, was determined after the suit of *Sedbery* v. *defendants* was decided. The practice which is therein adopted, will not have a retroactive effect. *Bates* v. *Hinsdale*, 65 N. C. Especially as the present case conforms to the practice established by *Winslow* v. *Commissioners of Perquimans county*, 64 N. C,, 223, and *Pegram* v. *Commissioners of Cleveland county*, *Ibid* 557, therefore decided.

PEARSON, C. J. According to the view of this case taken in the Court below and by the counsel of both parties in this Court, two very interesting questions were presented.

1. Has the General Assembly power to forbid the Board of Commissioners of a county from levying and collecting a tax to pay an existing debt of the county, when the defendant is commanded to do so by the order of a Superior Court having jurisdiction of the matter?

2. Must the defendant take the responsibility of de-
(492) ciding this question, so that should the statute be held constitutional, the return is irresponsive and sufficient, otherwise the individuals composing the Board, subject themselves to fine and imprisonment for contempt?

It is settled, *State* v. *Jones*, 1 Ired., 414, the general rule is, no return can be made to a peremptory mandamus, except "that it has been obeyed," but should a statute be enacted, after such peremptory order, forbidding obedience or making obedience impossible, such new matter will, of necessity be a

sufficient return, provided the statute is constitutional and within the power of the General Assembly.

It was assumed in the Court below and by the counsel on both sides in the argument before us, that the Act, 7th of March, 1871, admitted only of the contruction that the creditors of the county were put to the alternative of accepting coupon bonds on time, or be without remedy; because the Board of Commissioners are forbidden to levy or collect any tax except for the accruing current expenses of the county, thus raising the questions above set out, and making a direct conflict of power between the Judge of the Superior Court and the General Assembly.

If this be the proper construction of the statute, there is much force in the objection, that it impairs the obligation of contracts. But we are of opinion that this view of the statute is too narrow, and that the scope and effect of it, is to empower the Board of Commissioners of the county to raise the necessary amount to discharge the liabilities of the county, outstanding at the time of the ratification of the Act, by issuing and selling in the market, coupon bonds, and in this way funding the debts of the county; according to this construction, the restriction that no other tax shall be levied except for accruing current expenses, is reasonable and proper, and the statute is relieved from the imputation of being unconstitutional and void.

This construction is not only warranted by the terms
(493) of the Act, but is called for by a well settled principle, that when a statute admits of two constructions, one of which is consistent with the Constitution, and the other is questionable, as violative of good faith, and tending to impair the obligation of contracts, the former should be adopted, in other words, if a thing may be done in a right way, or in a wrong way, it shall be presumed to have been done in the right way.

The peremptory mandamus required the Board of Commissioners "to levy the tax," on the coming in of the return, by which it was seen that the General Assembly had made provision for raising the money by a sale of bonds, and forbid the Board from "levying the tax." His Honor fell into error by not modifying the order, so as to require the Board to raise the money in the mode provided, for according to the proper construction of the Act, it was constitutional, and protected the Board from the charge of contempt. *State* v. *Jones*, *supra*.

This course would have met the exigency and taken away excuse for not instantly raising the money and paying it to the plaintiff.

Of course no difficulty was to be anticipated in regard to making sale of the bonds at a fair price, as the terms were reasonable and the bonds would, as seems to have been contemplated by the General Assembly, have been a good investment, all doubt in regard to the power of the Board to issue them, being out of the question, and the remedy against the county to enforce payment, being plain and direct.

For the error in not modifying the order, the ruling of His Honor is reversed.

This will be certified to the end that further proceedings may be taken in the Court below, according to the view we have expressed.

The defendants were the first to adopt the misconception as to the meaning of the statute, this was the occasion of the omission to modify the order. Throughout the pro-
(494) ceedings they have evinced but little anxiety to discharge their duty, and there has been a delay of justice. For this reason no costs are allowed. C. C. P., 278. The result of the ruling in this Court is in the nature of an order for a repleader, which is in effect a new trial."

PER CURIAM. *Venire de novo.*

J. A. LAMBETH, Administrator, &c., *v.* NORTH CAROLINA RAILROAD COMPANY.

1. The policy of the law requires common carriers to use a high degree of care, in transporting passengers, to guard against probable injury.
2. It is their duty to transport and place their passengers safely at the point of destination, and if injury to the passenger ensues from a failure to observe due care, the carrier is *prima facie* responsible.
3. Where a passenger jumped off a railroad train, while running at a speed of from two to four miles an hour, and this was the proximate cause of the injury complained of, and contributory negligence is alleged, the true criterion of the care required from the passenger is that degree which may have been reasonably expected from a sensible person in such situation.
4. A passenger on a railroad train had a right to expect that the carrier had employed a skilful and prudent conductor, who had experience and knowledge in his business sufficient to correctly advise and direct them as to the proper time and manner of alighting from the train.
5. Where, when the usual signal was given for slacking the speed of the

train, the conductor went with a passenger and his companion out on the platform to assist them in getting off safely, and such passenger, without any directions from the conductor, voluntarily increased danger by jumping off the train while in motion, the carrier is not responsible for injury resulting therefrom; but if the motion of the train was so slow that the danger of jumping off would not be apparent to a *reasonable person*, and the passenger acted under the instructions of the conductor, then the defence of contributory negligence would be unavailing.

6. Where there was evidence tending to prove that the intestate of the plaintiff informed the conductor that he wished to get off at a cer-
(495) tain point, and on approaching the place, the conductor went with him and another upon the platform of a rear car, and the intestate got upon the step of the platform, preparatory to springing off, conductor cautioning him not to "jump off yet," and when a few moments after, the conductor said "now is your time—jump," and thereupon he jumped off and on to a platform, fell down and rolled under the train and was killed; the train at the time going much slower by degrees than before the brakes were blown on, the other passenger alighting immediately after the intestate, running along with the train, rather than jumping off at right angles, that he was not able to "take up" for several yards; that intestate, when he jumped off, had, under his left arm, a stencil-plate about the size of an ordinary barrel head, between two pieces of very thin plank; also a satchel of capacity sufficient to hold two quarts, to which were attached light leather straps, passing around his shoulders, and that intestate also had a book in size, ten inches by five, and plaintiff requested the following instructions to the jury: "That if the jury should find that the defendant did not stop its train alongside of the place where the intestate desired to alight, and that the conductor, while passing such place (a platform), and when the cars were moving at from two to four miles an hour, directed the intestate to alight, and he obeyed the direction, he was justified in doing so, and his act in law, was not contributory negligence hindering a recovery;" *Held*, that the refusal of the Court to give such instructioas was erroneous, and entitled the plaintiff to a *venire de novo*.

This was a civil action, tried before His Honor, Judge Tourgee and a jury, at Fall Term, 1871, of Guilford Superior Court.

The plaintiff complained for the negligent killing of his intestate by the defendant, a common carrier.

It was in evidence, on behalf of the plaintiff, that at the time the injury was received, resulting in the death of J. S. Brown, his intestate, the latter was a passenger on the train of the defendant from Greensboro to Graham station, and the injury was received at Graham under the following circumstances:

One Anthony testified that he and the intestate of the plaintiff were on the train and tried to get off at Graham station; that when near the depot the whistle was sounded for application of brakes, and thereupon he and Brown went out

upon the platform at the end next the sleeping car,
(496) which latter was the rear car of the train; that when they got on the platform the conductor, Ligon, was present with his lamp in hand, and he commenced with one hand to tighten the brake on the platform of the sleeping car, and the witness stood on the platform of the coach next before the sleeping-car and, reaching across, helped him to tighten the brake; that when the coach on which Brown and witness were passengers was passing opposite the platform at the depot, and whilst the conductor and witness were tightening the brake, Brown got down from the platform on to the steps, as if about to alight, when the conductor cautioned him not to jump yet, saying the train would get slower; that when about opposite the center of the depot platform, or a little past, Brown still standing on the steps of the car platform, the conductor said, "now is your time; jump!" and thereupon Brown immediately alighted on the depot platform and fell down, and in some way, the witness could not tell how, got under the train and on the track, and was run over and was crushed, so that he died; that at the time of the occurrence the train was moving much slower than before the blow for brakes, and had gotten still slower after the joint effort of the witness and conductor to tighten the brakes; that witness alighted immediately after Brown; that he could not tell the rate of speed at which the train was moving, but seeing that Brown had fallen, as he (witness) alighted, he jumped off, running with the cars, rather than at right angles with them, and that he was not able to take up until he had reached the extreme end of the platform; that Brown had under his left arm a stencil, plate about the size of the head of a whiskey barrel, between two pieces of very thin plank, and a small satchel, of capacity to hold two quarts, swinging from his shoulder by leather straps, both being very light, and also a small book, about ten inches by five in size.

Mr. Ligon, the conductor, testified that when the blow was sounded for brakes before reaching the depot, he went out of the coach to let the witness Anthony, and Brown, off,
(497) intending to stop the train; that they followed him, and when they got out, Brown got down on the third or lowest step of the platform as if to jump, and he (the conductor) with one hand tightened up the brake, assisted at the time by Anthony, and whilst the parties were in that position he cautioned Brown not to jump, saying the train would

stop, and thereupon Brown got back one step—the middle step; that after this, when passing the platform, being nearly opposite the depot, and seeing that the train was not going to stop alongside the platform as he expected, he put his hand on Brown and told him to get down and be ready to get off. Brown, at his suggestion, getting down on the lowest step again, and the conductor at the same instant seizing the brake with both his hands and attempting to tighten it; that he did not tell Brown "to jump off, now is your time," that he told him only to get down on the lowest step and be ready to get off.

In answer to a question put by the plaintiff, witness said he saw Brown on the lowest step making signs as if about to jump, and that he did not put his hands on him to prevent him, because he was out of reach, and although within reach of his voice, and he had time, and could have cautioned him, he did not caution him with his voice; that Brown jumped a moment after the signs, as before stated; that when Brown jumped off, the train was going at the rate of from two to four miles per hour, and that the train did not stop until the extreme rear car had passed the platform some ten feet.

John Hipps, the engineer, testified that he was directed to stop at Graham, and that before reaching the depot he blew for brakes, and they were applied, but they did not appear to hold as usual; that the train did not stop in pursuance of the "blow", when it ought to have stopped, and he did not know whether the brakes were out of fix or not, but somehow, the brakes did not hold as usual.

Upon this evidence, the plaintiff requested the Court to instruct the jury (amongst other matters), as follows, viz:

(498) "That if the jury should find that the defendant did not stop the train alongside of the platform, and that the conductor, whilst passing the platform, and when the cars were moving, at from two to four miles per hour, directed Brown to alight, and he obeyed the direction, he was justified in so doing, and his act, in law, is not contributory negligence, hindering a recovery."

His Honor declined to give the instruction prayed, but charged the jury that any alightment from the cars when moving, was contributory negligence, and, in law, disabled the plaintiff to recover.

There was a verdict for the defendant, and from the judgment rendered thereon, the plaintiff appealed.

Dillard & Gilmer, for the plaintiff.
J. T. Morehead, Jr., for defendant.

Defendant's counsel filed the following brief:

The negligence of plaintiff's intestate contributing, plaintiff cannot recover even if the defendant was grossly negligent. Angell on Carriers, sec. 556; Pierce on Railroads, pp. 272, 276, 475, 476; 2d Redfield, 205; Boury, pp. 99, 149.

When plaintiff's evidence shows contributory negligence, 'tis proper for the Court to take the case from the jury, etc. Pierce on Railways, 284; Angell on Carriers, sec. 559, (a).

The conduct of the plaintiff's intestate, encumbered, as he was, with baggage, etc., was foolhardy, and he was guilty of *gross negligence.*

DICK, J. The intestate of the plaintiff was a passenger, under the charge of the agents of the defendant, and he was killed in getting off the train. The policy of the law, which is ever solicitous for the protection of human life, requires common carriers, who have charge of the safety of passengers, to use a high degree of care to guard against probable injury. As the intestate was a passenger on the
(491) train, it was the duty of the defendant to transport and place him safely at his point of destination.

If the injury sustained was caused by a want of proper care on the part of the agents of the defendant in the performance of this duty, it is *prima facie* responsible in damages to the plaintiff.

The principle defence relied on in the Court below, was that the intestate, by his own negligence or misconduct, contributed to cause the injury sustained. The act of the intestate in jumping off the cars while they were in motion at the rate of from two to four miles per hour, was the proximate cause of the injury, and the question is whether he exercised ordinary care under the circumstances. Ordinary care in this case, is that degree of care which may have been reasonably expected from a sensible person in the situation of the intestate. He had a right to expect that the defendant had employed a skillful and prudent conductor, who wou.d not expose passengers to dangerous risks, and who had experience and

knowledge in his business, sufficiently to correctly advise and direct passengers as to the proper time and manner of alighting safely from the train.

When the usual signal was given for stopping or slackening the speed of the train, the conductor went with the intestate and Mr. Anthony out on the platform of the car to assist them in getting off safely. If the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff is not entitled to recover. If the motion of the train was so slow that the danger in jumping off would not be apparent to a reasonable person, and the intestate acted under the instructions of the manager of the train, then the resulting injury was not cause by contributory negligence or a want of ordinary care. Sherman & Rld on Neg., chs. 15 and 27.

The circumstances attending the injury are given in the testimony of Mr. Anthony and the conductor, who were both present, witnessed the occurrence, and had equal op-
(500) portunity of knowing the facts. Their testimony was conflicting in material points, and it was the province of the jury to determine the truth of the matter, and render a verdict in accordance with the instructions of His Honor on the questions of law arising upon the ascertained facts. We think His Honor erred, in refusing to give the first instructions asked for by the counsel of the plaintiff, for if the testimony of Mr. Anthony is to be believed, there was no such contributory negligence on the part of the intestate as to prevent a recovery in this action.

For this error there must be a *venire de novo*, and it is not necessary for us to express an opinion as to the rights of the parties, if the jury should find that the testimony of the conductor gives the truth of the transaction.

Let this be certified.

PER CURIAM. *Venire de novo.*

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(501) JOHN W. ELLIS *v.* SAMUEL HUSSEY.

1. A vendor who contracts to convey upon payment of the purchase money, is, as between the parties, a mortgagee.

2. It is well settled that a mortgagee possesses two remedies which he may prosecute at the same time, namely, one *in personam* for his debt, the other *in rem* to subject the mortgaged property to its payment by foreclosure.

3. A resort to the first does not amount to a waiver of the second, or *vice versa.*

4. The two actions are not for the same cause, and a different relief is obtained in each, and this continues to be the case, notwithstanding that a single Court grants all the relief which was formerly sought in two.

This was a civil action, tried on complaint and demurrer, before His Honor, Judge Mitchell, at Fall Term, 1871, of Iredell Superior Court.

The plaintiff, in his complaint, set forth in substance that one Redwine, being the owner of certain real estate, contracted to sell the same to the defendant, and that defendant executed his note for the price, that the legal title had passed by a series of conveyances from Redwine to the plaintiff, and that the plaintiff had likewise purchased the note, had brought suit on the note, obtained judgment, and that the execution which issued thereon had been returned unsatisfied, and prayed a specific execution of the contract and sale of the premises.

The cause of demurrer specially assigned, was, "that it appears from the complaint that the same plaintiff brought a suit against this same defendant upon the same contract, and subject matter, as is contained in this complaint to Fall Term, 1869, and at Spring Term, 1870, obtained a judgment against this defendant thereon; that there is no distinct legal and equity jurisdiction in this Court, and that all matters of dispute arising upon the said contract were then deter-
(502) mined and adjudicated, or should have been determined and adjudicated," &c.

His Honor overruled the demurrer, and rendered judgment in favor of the plaintiff according to the demand of the complaint. From which the defendant appealed.

Furches, for the appellant.
Armfield, for the appellee.

1. The pendency of one suit between the same parties for the same cause of action, is a good defence to a second. *Harris* v. *Johnson*, 65 N. C. R., 478.

2. When the relief sought may be had in a suit then pending between the same parties, this is a good defense against a second suit. *Council* v. *Rivers*, 65 N. C. R., 54.

3. Where a suit is pending between the same parties, relief

must be sought in that action. *Rogers* v. *Holt*, Phillips, Eq., 108.

4. Also see *Mason* v. *Miles*, 63 N. C. R., 564.

RODMAN, J. A vendor, who contracts to convey on payment of the purchase money, may be considered as between the parties a mortgagee. It has always been held that a mortgagee has two remedies which he may prosecute at the same time, one *in personam* for his debt, the other *in rem* to subject the mortgaged property, and it never was supposed that a resort to the first waived the second, or that after a sale of the mortgaged property, he could not resort to the first for any unpaid residue. 2 Story Eq. Jur., 1007, 1034, 1035, c. 9th edition, citing *Thurber* v. *Jewett*, 295.

It is true that the plaintiff in this case could, in an action seeking a sale of the property which he held substantially as mortgagee, have obtained a judgment for the sale of the property, and that if the property brought less than the debt, he could have execution against the debtor for the residue. But

(503) that would not have given him the full benefit of his action *in personam* by which he obtained execution against the debtor, before a sale of the property, whereas upon his action to subject the property, he would have been compelled first to exhaust the property. The two actions are not therefore for the same cause, and a different relief is obtained in each. And this continues to be the case, notwithstanding a single Court gives all the relief which must have heretofore been obtained in two.

There is no error. Judgment affirmed, and the action is remanded to the Superior Court of Iredell to be proceeded in according to law.

PER CUIRAM. Judgment affirmed.

L. & E. MILLER to the use of J. B. Carlisle *v.* THE LAND AND LUMBER COMPANY OF NORTH CAROLINA.

1. If goods are sold to a party, on the representations of one professing to be his agent, and are afterwards delivered to such party and invoiced to him and the invoice received and the goods are used by him, he is bound for their value, and under such circumstances, it is immaterial whether the person professing to be agent was such or not.

2. In order to avoid such responsibility, the party to whom the goods were sent should have, on the receipt of the invoice, promptly refused to receive, otherwise silence gives consent under the maxim *qui tacet clamat*.

3. The invoice was notice that the credit was given to such party.

4. In such case it is immaterial that the officers of such party (a corporation) did not intend to induce the seller to believe that the corporation had bought and would pay for the goods, or that they would not have kept the goods if they had not known that the corporation was bound to pay the seller for them.

5. The rule is, that when one, by his conduct, unintentionally gives another resonable ground to believe that a certain state of facts exists, and the other acts on the belief so induced, that he will be dam-
(504) aged if it is not true, the person so inducing is estopped as to the other afterwards to deny the existence of such state of facts.

6. The retention of the goods and silence after receipt of invoice, furnished reasonable ground to cause the sellers to believe that the corporation ratified the sale and may naturally have prevented them from taking such action as they otherwise would for their security.

7. It was not erroneous to permit the plaintiffs on the trial below to testify that such agent informed them before the sale, that he had in his possession a letter from an officer of the defendant authorizing him to purchase the goods for it—such evidence is not liable to animadversion as evidence to prove the contents of a writing by parol, the evidence not being directed to show that there was a genuine letter, containing such contents, but merely the representations of the agent as to the contents of a letter, *in confirmation of the plaintiff's evidence* that the credit had been given to the corporation and not to the agent.

This was a civil action tried before His Honor Judge Pool, and a jury, at Spring Term, 1871, of Pasquotank Superior Court, and was brought to recover the value of certain goods which the plaintiffs alleged had been sold and delivered by them to the defendant.

On trial, the plaintiffs having introduced testimony tending to prove that they gave credit to the defendant, to confirm the evidence of the witness (one of the plaintiffs), it was proposed to show that one Ambrister negotiated with plaintiffs for the purchase of the goods on behalf of the defendant, representing himself as its agent, and that he showed orders (called in the exceptions and opinion, "letters"; but in the deposition, "orders") from the officers of the company authorizing him to purchase such goods for the company, and that the plaintiffs gave credit to the company upon the strength of the orders or letters—the letters not being produced on record—the defendant objected to the evidence on the ground that it was an attempt to introduce parol evidence of a writing, without producing it or accounting for its nonproduction. This evidence, however, was received by His Honor, and the defendant excepted.

There was evidence tending to prove that plaintiffs
(505) sold the goods to the defendant and gave it credit

therefor; that they invoiced the goods in the name of the defendant and forwarded the invoice to defendant, and also shipped the goods to defendant, which were received and used by defendant.

It was also admitted that Ambrister was a stockholder in the company.

There was much rebutting testimony offered by defendant, to show that Ambrister had no authority to act in any manner as defendant's agent, and that neither the defendant, or its officers, had ever ratified any act of Ambrister as such, which it is deemed unnecessary to recapitulate in detail, as the case in this Court turned upon the question of evidence and His Honor's charge.

The defendant requested His Honor to give the following instructions to the jury, viz.:

1. That there can be no recovery in this case, unless John G. Ambrister was the agent of the defendant.

2. That there was no legal evidence in this case showing that John G. Ambrister was directly or indirectly authorized to buy the goods of L. & E. Miller, or any one else for them, or that he ever was their agent for any purpose whatever, and that no act of his has ever been ratified by the defendant or any of its officers.

His Honor declined to give these instructions to the jury, for which the defendant excepted.

His Honor instructed the jury, that if from the testimony they believed that John G. Ambrister had an agreement with L. & E. Miller, that the goods bought by him and shipped to the defendant should be charged to his own account, and afterwards be credited upon the notes held by Peter Ambrister & Co., the defendant was entitled to a verdict.

But if they believed that no such agreement had been made, and that L. & E. Miller sold to John G. Ambrister, as the agent of the defendant, and the defendant afterwards received the goods, that it become responsible for (506) them by thus ratifying the act of Ambrister, even though he had never been authorized to buy goods for them. The defendant excepted to the charge.

Under the instructions of His Honor, the jury found a verdict in favor of plaintiffs, and from the judgment rendered thereon the defendant appealed.

Smith & Shaw, for the appellant, argued:

That in order to entitle the plaintiff to recover on the idea of a ratification of Ambrister's acts, done professedly as the defendant's agent, His Honor should have charged that the defendant enjoyed the benefit of the goods after being fixed with a *knowledge* of such action by Ambrister, of which there was no evidence.

They also argued a point of evidence which appears from receiving no observation in the opinion, to have been waived.*

Brayg & Strong, for the appellees, filed the following brief:

1. Ambrister's declarations are admissible as part of the *res gestæ*.

2. The facts that the goods were *purchased* by John G. Ambrister, that bills were sent to the defendant, in which the goods were charged to it, and that said goods were used by the defendant, *were some* evidence of the agency at the time of the purchase, or of a confirmation afterwards—enough *at least*, to authorize the Judge to admit the declarations of Ambrister. The evidence of the defendant is not to be considered. *State* v. *Dulla*, Phil., 437; *State* v. *Andrew*, *Ib.*,
(507) 205; *Creech* v. *McRea*, 5 Jones, 122; *Scott* v. *Brown*, *Ib.*, 406; *State* v. *Dick*, 2 Winston, 45.

3. Ratification of contract. Angel and Ames, 238, 241, especially 240, and cases cited.

4. As to what is some evidence. *State* v. *Allen*, 3 Jones, 257, *State* v. *Long*, 7 Jones, 24.

That portion of the Judge's additional statement not responsive to the letter addressed to him cannot be considered. But if it can, the evidence set forth therein as having been objected to, to-wit: that no credit was entered upon the note which Ambrister held against the Millers, is competent as tending to negative the idea that he purchased on his own account. Ordinarily men do not allow notes to stand open for the full amount against them, when they are entitled to a credit for $1,300.

RODMAN, J. We think the defendant's exceptions to the instructions given by the Judge below cannot be sustained.

The jury found that the goods were sold by plaintiffs on

*NOTE.—The Attorney General regrets that owing to the bad chirography of the brief filed by appellant, he could not publish it in full.

the credit of the defendant, upon the request of a person representing himself as its agent; that they were sent to and received by the defendant; that at or about the time of their receipt, the officers of the company also received invoices sent by plaintiffs, in which the defendant was charged as debtor for the price of the goods, and that afterwards defendant used the goods. We agree with the Judge that with these facts in proof, it was immaterial whether Ambrister was ever authorized to purchase the goods for the company or not; by keeping them with notice that the plaintiff had sald them to the company and upon its credit, the company became liable for the price. If it did not mean to become liable, it should at once on the receipt of the invoices, have repudiated the purchase and refused to receive the goods. Instead of doing so, by silence it allowed the plaintiffs to believe that it consented to the purchase and undertook to pay.

(508) Under such circumstances, "*qui tacet clamat,*" silence is consent. It is no defence to say that the defendants officers know nothing of the representations made by Ambrister to the plaintiffs, and that they were deceived by his representations to them, that he had bought the goods on his own credit. The invoice was notice that the plaintiff sold to, and credited the company. It is also immaterial that Ambrister had no authority to buy for the defendant, and that the officers of the company did not intend to induce the plaintiffs to believe that it had bought and would pay for the goods, or that they would not have kept the goods if they had known that the company was to pay plaintiffs for them. The rule is, that when one by his conduct, unintentionally gives another reasonable ground to believe a certain state of facts, and the other so acts on that belief that he will be damaged if it is not true, the person so conducting is estopped as to the other afterwards to deny that state of facts. This rule is so reasonable as not to require the support of authority.

It is supported however by several, among which, as being very pertinent, we select *Cornish* v. *Abingdon*, 4 Hurl & Norman Exch. 549.

The keeping of the goods and the silence of the defendant after the receipt of the invoices were a reasonable ground for the plaintiffs to believe that the Company ratified the sale, and may naturally have prevented them from taking such

steps as they otherwise would have taken for their security.

As to the question of evidence, the Judge allowed plaintiff to testify that Ambrister told them that he had a letter from an officer of the company, authorizing him to purchase the goods for it. The defendant contended that this was proving the contents of a writing by parol. This is a mistake.

The evidence was not directed to show that there was any genuine letter with such contents, but merely the reresentations of Ambrister as the contents of a letter, in confirmation of the plaintiff's evidence, that credit had been given
(509) to the company and not to Ambrister. Under the circumstances it was immaterial whether the letter had existed or not.

We think the evidence was admissible.

There is no error.

PER CURIAM. Judgment affirmed.

BURNS & SMUCKER *v.* HARRIS & ALLEN.

1. Whether a partner, on a deficiency of partnership assets to pay partnership debts, is entitled to a personal property exemption of $500 out of such assets, in preference to the said debts; and whether, if such partner has individual property sufficient to cover such exemption, he shall be compelled to resort to that, are questions of great importance and deserving serious consideration; but as the facts out of which they arise are only set forth inferrentially this Court will not proceed to consider them, but remand the cause to the end that the facts may be ascertained and the rights of the parties declared.

This was an appeal from a decision rendered by His Honor, Judge Wates, at Chambers, on the 28th day of January, 1871, in a civil action pending in the Superior Court of Franklin.

The action for goods, &c., sold, was commenced October 15th, 1870, and before the summons term, justices executions issued on judgments in favor of other creditors against the defendants, who were merchants, on the 27th October, 1870; the constable before levying, proceeded to lay off to each of the defendants, out of the partnership effects, an exemption of $500; on the same day the defendants executed a deed in trust to Mr. Bullock, but for what property and on what trusts does not appear; in the deed the bargainors attempt to

reserve or except the property exempt by the Constitution and laws; on the 2d of November, 1870, the report of the appraisers was duly certified and registered; the deed in trust was registered on the 10th of November; on the
(510) 8th of November a warrant of attachment issued in this action which was, on the 9th, levied on the stock of goods of the defendant, including that portion laid off by the constable; thereupon a motion was made to His Honor to discharge the levy of the attachment as to the property laid off.

His Honor allowed the motion and the plaintiff appealed.

The appeal was heard at June Term, 1871, and the Court took an *advisari* until the present term.

Battle & Sons, for the appellant.
Fowle and *A. M. Lewis*, for the appellee.

READE, J. The property of a partnership belongs neither to one partner nor another, but to both or all. And the individual interest of a partner is only a share of what remains after the partnership liabilities are satisfied and the partnership closed up. This is the general rule. Whether, therefore, one of the partners is entitled to have his $500 personal property exemption out of the partnership effects, before the debts of the firm are satisfied, is a grave question, which may come up for decision but it does not clearly arise in this case and, therefore, we do not decide it. It would arise in this case if it appeared that the remainder of the partnership effects, after taking out the exemptions, was sufficient to pay the partnership debts.

Upon the supposition that the partnership effects are insufficient to pay the partnership debts, and upon the further supposition that the individual partners are entitled to their exemption nevertheless; then, another question arises: suppose the individual partners have property of their own, not connected with the partnership, are they not obliged to select their exemptions from their individual property before going upon the partnership property? How is the fact in this case? Have the parties individual property of their own? It does not appear whether they had or not, except by inference.

We infer that they had, because it is said that they
(511) made a deed in trust, about the time of the levy of the execution to one Bullock, the contents of which are

not stated, except that it is provided in said deed that it shall not affect their personal property exemption. We infer from this that they had property, but nothing specific appears. We, therefore, reverse the order of His Honor below and remand the cause to the end that the facts may be ascertained and the rights of the parties declared according to law. And if the case is to be before us again, we suggest that it be ascertained and stated whether the partnership effects were sufficient to pay the debts of the partnership, and whether over and above there would be anything to divide out among the partners; and also, whether the individual members had property of their own out of which the exemptions might be allowed; and also, whether the property exempted is the same for which the debt due the plaintiff was contracted.

There is error. Let this be certified.

PER CURIAM. Judgment reversed.

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(512) THOMAS L. HEMPHILL and wife *et. al. v.* CARLTON GILES.

Where a person had become tenant from year to year to a mortgagor, before the execution of the mortgagee deed, in which three, four and five years had been given for the payment in equal instalments of the bonds secured by it, and afterwards had become the tenant of the mortgagor's right of redemption; *It was held*, that though four years had elapsed from the date of the mortgage, and no payment had been made on the bonds, yet the mortgagee could not recover the possession of the land from such tenant without giving him a reasonable notice to quit: and further, that he was not bound to give him six months notice because of his attornment to a landlord other than a mortgagor.

This was a civil action brought to recover the possession of a certain tract of land, tried before Mitchell, Judge, at the last Fall Term of the Superior Court of Burke County.

The complaint and answer were in the usual form, and there was no dispute as to the parties.

The plaintiffs claimed under a mortgage in fee, executed by Wm. F. McKesson to their ancestor Jacob Harshaw, on the 5th day of February, 1867, and the deed was to be void upon the condition that certain bonds should be paid in three, four and five years in equal instalments.

It was admitted that no payments had been made on the bonds, though more than four years had elapsed before bringing the suit.

The defendant was introduced as a witness by the plain-

tiffs, and testified that he had entered into the possession of the land more than a year before the date of the mortgage; that at the end of the first year he paid the rent to the said McKesson, and was told by him to remain on the land upon the same terms as he had been doing; that after two or three years, he became a tenant of the same land to one Charles F. McKesson and had paid him the rent; that he had never been ordered for notified to quit, and that he was still in possession.

Upon these facts His Honor charged the jury that (513) the plaintiffs were entitled to recover.

Verdict and judgment for plaintiffs, and an appeal by defendant.

Folk, Busbee & Busbee and *Armfield*, for the defendant.
Battle & Sons, for the plaintiffs contended:

1. That after the time when the money is to be paid on a mortgage, the mortgagor is only a tenant at sufferance to the mortgagee, and the latter may recover by action of the possession of the mortgaged premises without giving notice to quit, or making a demand for the possession. *Fuller* v. *Wadsworth*, 2 Ired., 263; *Williams* v. *Bennett*, 4 Ired., 122; *Weaver* v. *Belcher*, 3 East. 448; *Keetch* v. *Hall*, Dougl., 21.

2. The mortgagee had a right to recover the possession of the land at least after the expiration of three years from the date of the mortgage, the mortgagor having failed to pay the first instalment. *Roylance* v. *Lightfoot*, 8 Mees. & Wels., 559; *Rogers* v. *Grazebrook*, 8 Adol. & Ellis (N. S.) 895, (55 Eng. C. L. Rep. 895.), Coote on Mort. 339, 2 Cruise Dig. Tit., Mort.

DICK, J. The defendant entered the premises in dispute, as a tenant from year to year of William F. McKesson, under a lease obtained before the execution of the mortgage under which the plaintiffs claim: and such tenant was entitled to six months notice to quit before the tenacy could be terminated. The plaintiffs took the estate subject to such incumbrance, and were bound by this fixed rule of law as to notice to quit.

The defendant, after the execution of the mortgage, held the land for several years as the tenant of Charles F. McKesson, a purchaser at execution sale of the legal right of redemp-

tion of the original lessor: and paid rent to such new landlord.

This attornment deprived the defendant of the bene-
(514) fit of his original lease as to six months notice to quit.

As he entered the premises lawfully, and held possession for several years, with the implied consent and acquiesence of both the legal and equitable owners, he was entitled to reasonable notice to quit before he could be deprived of such possession by a civil action. 1 Saund. Pl. 465; Chitty on Con. 102; Adams' Ej'ct 104; *Butner* v. *Chaffin*, Phil. 497, and the cases cited.

As this action was brought without giving reasonable notice to the defendant, it cannot be sustained.

There was error, and the action must be dismissed.

PER CURIAM. Judgment reversed.

JAMES CALLOWAY *v.* JOHN Y. BRYCE.

1. Where on the trial of an action for breach of contract, it is alleged that the original contract touching which there was no dispute, had been varied, and the contents of certain letters are relied on, and the same being shown to be lost, there is parol proof of their contents, and it is admitted that the letters contained a modification, and there was no controversy as to the particular language used in them, and *held* that this Court could not pronounce a charge erroneous which submits to the jury to find whether or not the contract had been modified as contended for, especially when the point made in this Court, to-wit: that His Honor should have instructed the jury as to a question of law whether the evidence proved a modification, does not appear to have been suggested in the Court below, but on the contrary, on the trial it seemed to be conceded, that if the contents of the letters were, as testified to that there had been a modification and the contest was as to the fact of the existence of the letters.
2. Although the general rule is that where a contract has existed in writing, it is the duty of the Judge on proof or its contents, (if lost) to instruct the jury as to the *legal effect* of the words, yet the vigorous application of this rule is often impracticable, it being impossible in many cases, to separate the language used from its meaning, so as to eliminate one from the other.
3. Nor is it in general, important when the words used are untechnical as in such cases a jury is as competent to pass on the effect as a Judge.

(515) This was an action on the case tried before Mitchell, Judge, and a jury at the Fall Term, 1870, of Wilkes Superior Court.

The plaintiff declared against the defendant in two counts:

1. Trover for the conversion of a quantity of brandy.

2. For a breach of duty by defendant, as the plaintiff's bailee of the brandy.

There was evidence in behalf of the plaintiff, tending to show that the plaintiff had stored with the defendant about 219 gallons of brandy about the 20th of June, 1864, for sale; that the defendant was to receive by way of compensation, one half of all realized over $70 (Confederate money) per gallon, this agreement was admitted by the defendant; it was also in evidence by the oath of the plaintiff, that in the fall of 1864, he modified the agreement by requiring the brandy to be sold $\frac{1}{3}$ for specie, $\frac{1}{3}$ for bank notes, and $\frac{1}{3}$ for Confederate bonds, and to pay the defendant a reasonable commission; that he communicated this proposed variation of the agreement to the defendant by letter, and received letters from him in reply assenting thereto: it seems that the parol evidence of the contents of the letters was received without objection.

The defendant insisted that there had been a modification of the contract, and introduced in evidence sundry letters from plaintiff to him, and after evidence of loss, was permitted to give in evidence their contents in support of this view.

The plaintiff denied the alleged second modification.

His Honor, in his charge, left the question of modification of the original contract as a question for the determination of the jury, reciting the evidence *pro* and *con*, and with appropriate observations, touching the respective rights and obligations of the plaintiff and defendant upon the different hypotheses presented by the conflict of testimony.

No request was made to His Honor to instruct the jury as to the legal effect of the language used in the letters, and the only point made by the defendant below was raised by a special request to instruct the jury that if the contract (516) was as first above stated, that plaintiff had no right to charge it, &c., which was declined by His Honor.

There was a verdict and judgment for the plaintiff and the defendant appealed.

Battle & Sons, for the appellant:

1. What a contract means is a question of law. 2 Par Cont., 422, note b. *Hutchison* v. *Burke*, M. and W., 235;

Young v. *Jeffries*, 4 D. and B., 216; *Massey* v. *Belisle*, 2 Ired., 170; *Sizemore* v. *Morrow*, 6 Ired., 54.

2. What amounts to an abandonment of the contract is a question of law for the Court. *Dula* v. *Cowles*, 7 Jones, 290.

Batchelor, *Strong* and *Armfield*, for the appellee.

It was properly left to the jury to say whether the original understanding had been modified. *State* v. *Scott*, 64 N. C., 586.

RODMAN, J. The only question which is made in this case is upon the instructions of the Judge below. But the point cannot be made intelligible without a brief statement of the case. The declaration alleges that the plaintiff, being the owner of certain brandy, deposited it with the defendant for sale, and that he kept it so negligently that it was lost; and in a second count, that defendant sold it, but has refused to account for the price.

There was evidence tehding to show that plaintiff had deposited the brandy with the defendant for sale, and the parties had agreed that the price should be not less than $70 per gallon in Confederate money, and that defendant should receive as his compensation one-half of all he could sell, for over that price.

There was also evidence that plaintiff afterwards instructed the defendant not to sell on those terms, but to sell for
(517) one-third specie, one third North Carolina Bank notes, and one-third Confederate bonds of a certain description, to which the defendant assented. The evidence of the modification of the former contract was in certain letters from the defendant, which were lost at the trial and the contents of which were proved by the testimony of the plaintiff.

There was also evidence tending to show that these latter instructions had been withdrawn, and the currency in which payment was to be received, left to the discretion of the defendant.

His Honor left it to the jury to find, whether the first contract (the existence of which was admitted on both sides) had been modified, as contended by the plaintiff, and also whether, if so modified, this last contract had been subsequently changed, as contended by the defendant. He also instructed the jury as to the measure of damages in the

event that they should find that the first contract had been modified and that no subsequent change had been made; but no exception was taken as to this part of the charge.

The jury found a verdict for the plaintiff. The defendant excepts to the part of the charge which submits to the jury to find whether or not the first contract had been modified, as contended for He contends that as the proof of this modification was in writing, it was the duty of the Court to put a construction upon the writing, and to say whether or not, in law, the language of the writing amounted to a modification; and this was not less the duty of the Court, because of the loss of the writing and the oral proof of its contents; but that the Judge should have left it to the jury to find the contents, with instructions as to the legal effects of such contents; that is to say, if there were—thus—it amounted to a modification, but if otherwise, it did not.

The first observation to be made on this exception is, that it does not appear to have been taken on the trial.

His Honor was not asked to submit the matter to the jury in the way, it is now said, he ought to have done. (518) There does not appear to have been any controversy as to the particular language of the letters. It seems to have been assumed that, if they existed at all, they amounted to a modication. For this reason alone, we should overrule the present exception.

But, secondly; although it is theoretically correct as a general rule, that where a contract has existed in writing, it is the duty of the Judge, on proof of the contents, to instruct the jury as to the meaning and legal effects of the words used; yet the vigorous application of the rule will be found in many cases inconvenient and impracticable. It is impossible, in many cases, to separate the language used from its meaning, so as to submit the one to the jury distinct from the other. Often all that the witness recollects, is the substance of the writing—that is, its meaning and effect is understood by him, and in such a case, a separation of the issues seems to be impossible. Nor is it, in general, important, where the words used are not technical, and have only the ordinary meaning, as appears to have been the case here. In such cases a jury is as competent to pass on their effect as a Judge is.

His Honor seems to have left the question to the jury in the only way the nature of the case permitted.

We see no error on the record.

PER CURIAM. Judgment affirmed.

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(519) JOHN TURPIN *v.* E. B. HERREN and A. L. HERREN.

1. In old equity causes, depending at the adoption of the Constitution, and brought here by appeal: if the facts are not found and set out, but the evidence fully satisfies this Court on which side the conscience and justice of the case lies, it will proceed to hear and determine the same.

2. In such cases, if this Court is satisfied that a note in possession of the wife of one, as a mere custodian, was obtained from her through the covin and cajolement of the maker, under pretence of a settlement, it will not decree a re-execution (the note being overdue) but an account of what is due thereon, and render a decree for such amount upon the principle of surcharging and falsifying."

(See *Burbank* v. *Wiley*, *ante* p. 58.

This was an old equity suit, pending in the Court of Equity of Haywood county, at the adoption of the present Constitution and regularly transferred under the Statute and was regularly set for hearing, and heard at Fall Term, 1871, of the Superior Court, His Honor, Judge Cloud presiding, on bill, answers, exhibits and depositions.

The bill alleged in substance that the defendants executed to him in February, 1861, a note of $300, and in the latter part of 1861, another note for $200, which, on his entering the Confederate army, he deposited with his wife *to safely keep, and without authority to dispose of in any way;* that while absent "serving his country," the defendant A. L. Herren (the defendants being partners, and having given their notes as such) by cajolery, covin and fraud, the circumstances attending which are minutely and at large stated in the bill, but considered unnecessary to be here recapitulated, induced his wife to surrender to him the said notes which he destroyed; that on his return after the surrender he demanded a re-execution, or payment, of said notes, which being refused,
(520) he filed his bill. The prayer was for a re-execution and for general relief.

The allegations touching the execution of the notes were evasively admitted by the answer, as also the obtaining of them from Mrs. Turpin, and a detailed statement was en-

tered into, to show that through several settlements with her in Confederate money, the notes had been absorbed, and denying fraud, &c.

The depositions of the plaintiff and his wife, fully sustaining the allegations of the bill, were taken, and sundry others corroborative thereof.

A. Herren's deposition was also taken, being a mere statement of his answer. Other unimportant depositions, tending to show that Mrs. Turpin was a shrewd woman, and that A. L. Herren was a shrewd man, were also taken.

His Honor made a decree ordering a re-execution of the notes but did not state *his finding of the facts*, on which his decree was predicated. The defendants appealed.

Battle & Sons and *W. H. Bailey*, for the plaintiffs, after arguing the cause on the proof, moved their Honors for an account and a decree accordingly, under the general prayer.

Ovide Dupre and *Phillips & Merrimon*, for the defendants.

PEARSON, C. J. We are satisfied from the bill, answer and process, that the defendants cannot rightfully refuse to account for the two notes, one for $300 and the other $200, and the $1,050 Confederate notes received of the wife of plaintiff.

The supposed calculation and settlement in 1864, between the defendant and the wife of plaintiff, clearly do not conclude him, and he has a right to insist, that the defendants should in good conscience come to a full and fair settlement, and allow him to sur-charge and falsify, the account stated with his wife, who, although proved to be a lady of
(521) much business capacity, is not an accountant and was not authorized by her husband to close up business transactions; so, as when he got back from the war, to prevent him from insisting upon having all the dealings and settlements with his wife, (so far as she was assuming to act as his agent, under an authority of which there is no evidence, except the fact that she is a wife, who may be well trusted by her husband,) looked into and gone over, or as the books say, "surcharged and falsified."

His Honor struck the merits of the case, but he failed to have his attention called to the fact that a Court of equity will never order a re-execution of a note which is past due. The course of the Court is to direct an account and payment

of the balance found—so as to put an end to the whole controversy, and not "breed another law suit."

There will be a reference to state the account, putting the two notes and the Confederate money and payments all into the account, at the scaled value, and striking a balance for which the plaintiff will have judgment and execution. Defendant to pay costs.

PER CURIAM.

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(522) C. R. THOMAS, to the use of J. C. Washington *v.* COMMISSIONERS OF CARTERET COUNTY.

1. To an action by *mandamus* instituted against the Justices of a county, Commissioners, selected under the Constitution, cannot be substituted as parties, and this error is not waived by answer, but may be taken advantage of at any stage of the proceedings.
2. A mandamus against the Commissioners of a county, should run against them as "a board," and not against the individuals comprising such board.

The cases of *Carson* v. *Commissioners of Cleveland County*, 64 N. C., 566, and *Askew* v. *Pollock*, at this term, cited and approved.

This was an appeal from the judgment of His Honor, Judge Clarke, rendered at Spring Term, 1871, of Carteret Superior Court.

The plaintiff filed a petition for mandamus under the old system against the Justices of Carteret county; pending that suit, the present Constitution went into effect, and thereafter, on motion of the plaintiff, the individuals, composing the Board of Commissioners of said county, were substituted as defendants, in the stead of the Justices, and filed their answer, to which the plaintiff replied.

On motion thereafter, His Honor, Judge Clarke, quashed the proceeding, and the plaintiff appealed.

Manly & Haughton, for appellant:

Whatever irregularities have occurred in suing out the writ, they were waived by the defendants, accepting a declaration and answering. *Hyatt* v. *Tomlin*, 2 Ired., 149.

No counsel for appellee.

(523) DICK, J. Proceedings to obtain a writ of mandamus against the Justices of a county, cannot be revived against the Board of Commissioners. *Carson* v. *Commissioners of Cleveland*, 64 N. C, 566.

His Honor in the Court below had no power to order the Board of Commissioners to be substituted as parties defendant in the place of the Justices of the county; and the answer does not waive this defect caused by an excess of judicial authority. The answer was not voluntary, as under the order of the Court the defendants were obliged to answer or be in contempt, and in their answer they insist that the proceedings are erroneous.

The maxim *consensus tollit errorem* does not apply when a proceeding is completely defective and void, and it will not apply in any case where the action of the party is not voluntary. The translation of the above maxim by Mr. Broom shows the extent of its operation in cases where it can be allowed. "The acquiesence of a party who might take advantage of an error, obviates its effect."

"When applied to the proceedings in an action, waiver may be defined to be the doing of something after an irregularity committed, and with a knowledge of such irregularity, when the irregularity might have been corrected before the act was done." Broom L. Max., 137 and 138.

The proceedings are defective in another respect. Such proceedings should be instituted against the Board of Commissioners and not against the individuals composing the Board. *Askew* v. *Pollock*, at this Term, and cases cited.

There is no error.

PER CURIAM. Judgment affirmed.

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(524) RUSSELL H. KINGSBURY *v.* JOHN FLEMMING *et al.*

1. If money be lent to aid in the accomplishment of an illegal purpose, such illegality is not purged by the borrower failing so to apply the money.

2. Hence where money was borrowed to hire a substitute for the Confederate war service, and the borrower did not hire such substitute, the lender cannot recover on the note given to secure such loan.

The cases of *Critchen* v. *Holloway*, 64 N. C., 526, and *Kingsbury* v. *Gooch*, *Ib.*, 528, cited and approved.

Justices READE and DICK dissenting.

KINGSBURY *v.* FLEMMING.

This was an action of debt on a single bill, commenced under the old system, and tried at July Special Term, 1871, of Granville Superior Court, before His Honor, Judge Watts, and a jury, upon the pleas of payment, set-off and illegal consideration, but the case turned upon the last plea.

There was evidence tending to show that the defendant, Flemming, the principal in the note, borrowed the money for which the single bill was given, to hire a substitute to put in his place as a soldier in the Confederate army, and that such purpose was communicated to the plaintiff at the time; there was also evidence, that for some cause, Flemming abandoned such purpose, or did not effect it, and offered to return the money to plaintiff, which he declined to receive, except some interest.

His Honor instructed the jury, that if they believed that the plaintiff was informed by the defendant at the time of making said loan, that the defendant wanted the money to hire a substitute to put into the Confederate army, the contract was void, and the plaintiff could not recover; that in this aspect of the case, it was immaterial whether in fact the money was so used or not. Under these instructions, a verdict was found for the defendants, and for alleged
(525) error in the charge, after unsuccessful effort for a *venire de novo*, he appealed.

No Counsel, for the appellant.
W. H. Young and *Phillips & Merrimon*, for the appellee.

The purpose and plaintiff's *scienter* being fixed at the time the contract is made, taints it *then*, and no matter *en pais* occurring after can purge the illegality.

An analogy is presented by the case of usury (it being settled that there is no distinction between a consideration *malum prohibitum*, and one *malum in se*, *Sharp* v. *Farmer*, 4 D. & B., 122) for the contract is avoided by the *reservation* of the usurious interest, the penalty was only incurred by its *receipt*. *Godfrey* v. *Leigh*, 6 Ire., 390, and while a Court of Equity will sometimes assist the borrower, it will not lend its aid to the lender.

RODMAN, J. The cases of *Critcher* v. *Holloway*, 64 N. C., 526, and *Kingsbury* v. *Gooch*, *Ib.*, 328, are binding authorities that one who lends money to another, knowing that his pur-

pose is to hire a substitute for the Confederate army with it, does an illegal act, and a note taken upon such contract is void. This case, however, differs from those in this respect: Here the defendant did not in fact apply the money to the illegal purpose; from some cause he did not put in a substitute, and offered to return the money to the plaintiff, who declined to receive it.

A majority of the Court think this makes no material distinction. It is true that in several cases the doctrine is stated generally, that where money is loaned for an illegal purpose, and it is actually so used, the contract is void, and the money cannot be recovered. But what is said of the actual use seems to be a mere *obiter dictum*, not necessary for the argument, and not applicable to the case in hand. We know of no case which holds that an actual illegal use must be proved
(526) in defence, and of no dictum directly to that effect.

We are unable to see any reason why it should be so. If to lend money, with the expectation (for knowledge as to a future event can only mean a strong expectation than it will take place,) that it will be applied to an illegal use, be of itself illegal, and vitiates the loan—which is the principle on which the above cited cases stand—we cannot see why the accident that it is not so applied should purge the illegality, and make that good which otherwise would be bad. If, indeed, the lender before the time for the accomplishment of the illegal purpose, should himself repent and repudiate the contract, and prevent the illegal act, it might be different. Perhaps in such a case, although he might not be able to recover on the illegal note, he might recover the money loaned on an implied assumpsit. But that is not the case here.

Justices READE and DICK dissented.

PER CURIAM. Judgment affirmed.

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(527) D. C. GHORMLY *v.* SAMUEL P. SHERRILL.

1. Where one, who stands in the position of a *quasi* mortgagee of land, sells the same to a purchaser, with notice of the equity of the *quasi* mortgagor, such purchaser takes subject to such equity.

2. Where one T handed to B certain papers, which would enable the holder to procure grants for certain tracts of land, receiving from B certain depreciated currency, with the *understanding* that B should take out the grants in his own name, and whenever T paid him $750.94, in greenbacks, B should convey to T; and B took out the grants in his own name and sold and conveyed certain of the tracts to G, with no-

tice of his trust to T; *Held*, that T had an equity of redemption, and that the purchase money paid by G to B, should be regarded as paid by T to B in redemption; and *Held*, further, that a purchaser of the land from T, before any of those transactions, is entitled to take the place of T and succeeds to his equitable rights.

This was a civil action, heard before His Honor, Judge Cannon, on a counter-claim and demurrer, and His Honor, having at Spring Term, 1871, overruled the demurrer and given judgment accordingly, the plaintiff appealed.

The facts are sufficiently stated in the opinion of the Court.

M. Erwin, *Strong*, *Ovide Dupree*, *Folk* and *Batchelor*, for the appellant.

Phillips & Merrimon, for the appellee.

READE, J. On May 30th, 1868, W. H. Thomas was in the possession of "transfers, agent's receipts and papers," of such character, but of what precise character we are not informed, as would enable him to procure grants from the State for the following tracts of land: Numbers 595, 10, 6, 12, 23, 17, 7, 9, 24 and 28. For some reason, not stated, he did not wish to take out grants in his own name, and, therefore, gave up his "transfers, agent's receipts and papers" to one T. D. Bryson, for which Bryson gave him $2,252.83, in "road certificates," which were a sort of scrip circulating as a depreciated currency in that locality, with the understanding that
(528) Bryson was to take out grants from the State for said lands in his own name; and whenever Thomas should pay him $750.94 in greenbacks, with interest, which we suppose was the estimated value of the $2,252.83 of "road scrip," Bryson would convey said lands to Thomas. Bryson took out grants from the State as agreed on. The agreement was in writing, signed by Bryson.

The effect of all this was to vest the legal title in Bryson, with an equity of redemption in Thomas.

In February, 1869, and before Thomas had paid anything in redemption, Bryson sold several tracts of the land, including those in dispute, to the plaintiff, informing him at the same time of Thomas' equity. The effect of this was to put the legal title out of Bryson into the plaintiff, subject, however, to the equity of Thomas.

Since the sale by Bryson to the plaintiff, the plaintiff has sold off several of the tracts of land for the sum of $550.

And Bryson has sold other tracts to other persons for the sum of $177.79, which, added to the sales by plaintiff, makes the sum of $727.79.

The effect of these sales by plaintiff and Bryson is the same as if the amount had been paid by Thomas in greenbacks, as agreed on, and leaves only a balance of $22.21 of the principal of the redemption money to be paid by Thomas.

Of the lands conveyed by Bryson to plaintiff, there remain in possession of the plaintiff two tracts, valued in the trade between Thomas and Bryson in road scrip at $339 24, which is more than sufficient to pay the balance of the redemption money and interest. And in addition to said two tracts in the possession of plaintiff, he has the legal title to the three tracts for which this suit is brought, and of which the defendant has possession.

In addition to the tracts sold to plaintiff, and other tracts sold to others, as aforesaid, Bryson still holds three of the tracts which were valued in his trade with Thomas at $329.17.

(529) And now it is insisted that, inasmuch as Thomas has paid all the redemption money except $22.21 and interest, by means of the sales made by plaintiff and by Bryson, and inasmuch as the plaintiff has the legal title and the possession of two tracts, worth $339.34, and Bryson has the legal title and possession of three tracts, worth $329.17, the plaintiff ought not to be allowed to recover possession of the three tracts which defendant has possession. And that upon the balance of the redemption money being paid up by Thomas, both the plaintiff and Bryson ought, not only to convey to him the legal title to three tracts in dispute, but also the two tracts of which plaintiff has possession and the three tracts of which Bryson has possession. And that if Thomas is unable to pay the balance of the redemption money, then the lands which the plaintiff and Bryson have in possession ought to be sold to pay it, and the balance, if any, paid over to Thomas. This is very clearly the equitable right of Thomas, and this is the liability of the plaintiff and Bryson.

But, then, Thomas is not the defendant, nor is he a party in this suit. It remains to be seen how the defendant is connected with the transaction, and what are his rights.

Prior to the trade with Bryson, Thomas, before he had any title as apears to us, but probably under some inchoate or supposed right, sold and conveyed one of the tracts in dis-

pute to the defendant, and the other two tracts to D. A. Sherrill, probably one of the defendant's family, but of that we are not informed. The effect of these transactions was to put the defendant and D. A. Sherrill in the place of Thomas as to the tracts in dispute, which are now in possession of defendant.

There is therefore no error in overruling the demurrer, and the judgment is affirmed.

This would be decisive of the case, so far as the right of the plaintiff to recover is concerned; but it is evident that the rights and liberties of the parties, including Thomas and Bryson and D. A. Sherrill, have not been administered;
(530) and it would seem that they ought to be administered in this suit and in conformity with this opinion, if we have had all the facts before us.

The case is therefore remanded, that other proceedings may be had, and such amendments and such parties made as the law allows, and as the parties may be advised.

This will be certified.

PER CURIAM. Judgment affirmed and case remanded.

WILLIAM J. GREEN *v.* R. W. WYNNE, Chairman of the Board of Commissioners of Wake county.

One summoned as a juror on a coroner's inquest is not entitled to any compensation.

Appeal from Wake Superior Court, Watts, Judge, presiding.

The plaintiff was summoned to serve on a coroner's inquest, and being a doctor of medicine, presented an account claiming pay as doctor and juror. There was no trial of the facts, which were disputed, in the Superior Court. His Honor disallowed the doctor's bill, but rendered judgment for two dollars, and the defendant appealed.

Devereaux, for the plaintiff.

This case turns on the construction of the third section of sub-chapter 9 of ch. 379, laws of 1868–'69. This section is in these words, "The same pay and mileage shall be allowed

to special jurors, and the same pay without milege to tales jurors."

The question arises, what is a special jury under this statute? A special jury is one summoned to perform
(531) some special and particular act, something outside of the regular duties of juries.

Why should the Act mention "special jurors" at all, unless all *special* juries were to be included?

A jury summoned on a special *venire*, returnable in term time, could have received its *per diem* under the general provisions of the first section.

Again, when a statute admits of two constructions, that is to be taken as the true intent of the Legislature which is most consonant with the principles of justice; and under no such principle could the Legislature pass a law forcing the citizen to devote his time and labor to the service of the public without giving him a reasonable compensation therefor.

Not unfrequently juries of inquest are detained for days, and in some extreme cases even for a much longer time. As in the recent case of the Westfield explosion, which is a matter of general public notoriety, the coroner's jury sat for weeks. Unless such services were paid for, a great wrong would be done to the poorer members of society, who depend upon their daily wages for their daily bread.

Badger, for the defendant.

BOYDEN, J. The only question made in this cause is whether a person summoned by a coroner as a juror upon an inquest, and who attends and serves, is entitled to be paid for such services.

Under the old system, the fees of the coroner and the physician were provided for, but no fees were allowed the jurors. In the case of forcible entry and detainer, the Act makes no provision for the payment of the jurors and witnesses. In the case of a jury of view, where a party claimed damages for overflowing land by the erection of a mill-dam, Rev. Code, ch. 71, sec. 15, provides that the jurors shall receive 80 cents per day and mileage. But we know of no other Act providing for the payment of jurors, except for sitting at Court.
(532) It is contended that the Act of 1868–'69, chap. 279, sub-chap. 9, sec. 1, 2, 3, entitles the plaintiff to pay for

attending as a juror, when summoned upon an inquest by a coroner.

We do not think so. The act is manifestly intended for the payment of jurors attending the Superior Courts, and has no reference to jurors attending inquests upon a summons of a coroner. The law in that respect remains as before the adoption of our present system.

There was error in rendering judgment for the plaintiff for two dollars.

This will be certified.

PER CURIAM. Judgment reversed.

M. H. BRANDON, Adm'r of J. D. COWAN *v.* T. A. ALLISON *et al*

1. To an action by an administrator, appointed before 1st July, 1869, on a note executed to himself as administrator, for the purchase of land sold under a license from Court, a judgment *quando*, obtained previously by the purchaser against such administrator, is inadmissible as a defence, either by way of set-off or counter-claim.
2. Whether such would be the case if there were no other debts against the estate, and the defendant was certainly entitled to have the assets applied to his claim, *quere.*

This was a civil action, tried before His Honor, Judge Mitchell, and a jury, at Fall Term, 1871, of Iredell Superior Court.

The action was founded upon a note given by the defendants for the purchase of real estate sold by the plaintiff as administrator, to pay debts, under a license from Court.

The defendants, by their answer, offered to set up
(533) as a set-off or counter-claim, a judgment *quando*, obtained theretofore by the defendant, Allison.

The plaintiff replied that there were other outstanding judgments, more than sufficient to absorb the amount of any recovery in this action, and all other assets which are in, or may come into his hands.

On the trial the defendant moved to non-suit the plaintiff, on what ground does not clearly appear ; but, as stated in the argument, because the plaintiff could not maintain a separate action upon a note given at what, the defendant contended, was a judicial sale.

Under instructions from His Honor, the jury disregarded the proposed counter-claim and rendered a verdict for the

full sum demanded in the complaint. His Honor also refused the motion to non-suit.

From the judgment rendered on the verdict the defendants appealed.

J. M. McCorkle, *Armfield* and *W. P. Caldwell*, for the appellants.

Phillips, *Furches* and *W. H. Bailey*, for the appellee.

READE, J. Before the Act of 6th April, 1869, which went into effect 1st July, 1869, preventing all preference in the payment of debts by executors and administrators, and requiring all debts of the same class, in their order, to be paid *pro rata*—executors and administrators had the right to prefer one debt to another of equal dignity. And this case stands under the old law, because administration was granted before the Act of 1869. There being other debts equal in dignity to the claim of the defendant, the plaintiff had the right to postpone the claim of the defendant, there not being enough to pay all. And besides this, it seems that other creditors had already obtained judgments against the administrator upon debts of equal dignity with the claim of the defendant, to an amount more than sufficient to (534) cover all the assets. The judgment *quando*, in favor of the defendant against the plaintiff as administrator, is not available as a set-off or as a counter-claim. It must be observed that the bond sued on is not a bond payable to the plaintiff's intestate, but it is a bond payable to the plaintiff as administrator, given by the defendant as the purchaser of land sold by the plaintiff as administrator, under a license from Court, to pay debts. It may be that if there were no other debts against the estate, and if the defendant was certainly entitled to have the assets applied to his claim, it would be vain to allow the plaintiff to collect the money of the defendant, when he would have to pay it right back. But that is not the case here, for it appears that there are judgments already against the plaintiff, as administrator, which will take all the assets.

PER CURIAM. Judgment affirmed.

WILLIAM R. McKENZIE *v.* THOMAS N. CULBRETH AND W. R. CULBRETH.

1. The principle is too well established and too long acquiesced in to be disturbed, that an agreement by a creditor to receive a part in discharge of the whole of a debt due to him by single bill, is without consideration and therefore void.
2. To this rule there are exceptions, as if:
   1. A less sum is agreed upon and received before the day of payment.
   2. Or at a different place.
   3. Or money's worth.
   4. Or where a general composition is agreed upon.

This was a civil action tried before His Honor, Judge Russell, at Fall Term, 1871, of Sampson Superior Court.

The plaintiff complained on a single bill.

The defendants answered accord, etc., and in sup-
(535) port of this defence, offered a receipt given by the obligee for a less sum than the note called for.

His Honor instructed the jury that the legal effect of the receipt was only a payment of the amount specified in it, and operated only as a discharge of the note *pro tanto*. To this charge the defendants excepted.

There was a verdict and judgment in accordance with the charge, and the defendants appealed.

Bragg & Strong, for plaintiffs.
B. & T. C. Fuller, for defendants.

Vide Parsons on Contracts, vol. 2, p. 618 and 685. And here the new agreement rests on sufficient consideration, viz: the settlement of a lost note.

This is not only a receipt, but is a contract, by reason of the condition. *Smith* v. *Brown*, 3 Hawks, 585.

And it is an equity which has attached to the note, in the hands of Lee, and which existed at the time of the assignment to plaintiff, and by which he is therefore bound. C. C. P., sec. 55. *Harris* v. *Burwell & Parham*, 65 N. C. R., 584.

And it may be applied, and effect given to it, as a covenant not to sue. *Russell* v. *Adderton, et al.*, 64 N. C. R., 417; *Winston* v. *Dalby, ibid*, 299; *Harshaw* v. *McKesson* v. *Woodfin*, 65 N. C. R., 688.

Reade, J. The question presented is, whether a payment by the debtor, and an acceptance by the creditor, of a less sum than is due upon a bond, as a payment of the whole, is

a discharge of the obligation, so as to preclude the creditor from recovering the remainder of the bond?

This principle is too well established, and too long acquiesced in, to be now disturbed; that an agreement by a creditor, to receive a part in discharge of the whole of a debt due to him by bond, is an agreement without considera-
(536) tion, and therefore void.

The doctrine is very well set forth in *Warren* v. *Skinner*, 20 Com. Law R., p. 559. Other authorities are abundant.

It is true that many cases are set down as exceptions to this general principle, for example:

1. If a less sum is agreed upon and received before the day of payment.

2. Or at a different place than the place originally agreed on.

3. Or if something other than money, and really of less value than the debt, is agreed upon and received in satisfaction, the Court will not consider the value to be other than as the parties have agreed upon it.

4. Or if there be a general settlement between creditors and their debtor, and a discharge upon payment of less than the whole amount.

In these, and in all other cases set down as exceptions to the general rule, there is some consideration, great or small, to support the agreement, and avoid the objection of *nudum pactum*.

There is no error.

PER CURIAM. Judgment affirmed.

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(537) URIUS BAUCOM *v.* ORRIN SMITH and another.

1. A note founded upon an illegal consideration, *payable one day after day*, endorsed after one day from its date, cannot be recovered on by the endorsee.

2. A note payable one day after date is due one day after date.

The case of *Henderson* v. *Shannon*, 1 Dev., 147, cited and approved.

Appeal from Wake Superior Court, Watts, Judge, presiding. Case agreed.

The action is on a note payable "one day after date," admitted to be tainted as between the original parties with an

illegal consideration. The note was executed by defendant, Smith, to his co-defendant, Bagwell, and by him endorsed about *three weeks* after its execution to the plaintiff, who had no knowledge of the taint, and gave full value for it.

His Honor gave judgment for the defendant and the plaintiff appealed.

Batchelor, for the appellant.

1. A purchaser for value, and without notice of a negotiable security, is not affected by any failure, illegality or want of consideration, or even fraud between the previous parties, but may recover thereon. *Riddick* v. *Jones*, 6 Ired., 107; 3 Kent, sec. 44, pp. 79, 80; *Ray* v. *Riddington*, 5 John, Ch. c., 54; *Brush* v. *Scribner*, 11 Conn., 388; *Swift* v. *Tyson*, 16 Peters, 1; Story on Promissory Notes, sec. 191.

2. This extends to all illegality at common law. In cases under statute of usury and gaming, the contract is void even in the hands of an innocent purchaser for value. But this only extends to the two cases of gaming and usury under the Statute. Cases cited above, and Chitty on Bills.

3. The taking a note in payment of a preceding debt (538) is a purchase for value. *Riddick* v. *Jones*, and authorities cited above.

4. The note sued on was not over due and dishonored when the plaintiff purchased it for value and without notice. *Farker* v. *Stallings*, Phillips' Law, 590; *Elliott* v. *Smitherman*, 2 D. & B., 338; *Parker* v. *Flora*, 63 N. C., 474; *Ormond* v. *Moye*, 11 Ired., 564; 1 Parsons on Contracts, 217.

5. On the very face of it, shows that it was intended to circulate for a while before being presented for payment.

6. The law greatly favors the negotiability of papers like this.

Fowle & Badger, for the appellee.

PEARSON, C. J. The bond sued on was void in the hands of the obligee, for the illegality of consideration.

Had the bond been assigned before it was due, the assignee for valuable consideration, and without notice, could have maintained an action to enforce payment. This is settled *Henderson* v. *Shannon*, 1 Dev., 47. That case however, assumed the law to be, that if the assignment be after the bond

was due, the assignee, would take it, subject to all the objections to which it was liable in the hands of the assignor.

The position taken on the argument that a bond payable "one day after date" is not due for some reasonable time after its execution, has nothing to support it. An action could have been brought on it the second day after its execution, without a demand. This shows that it was due. In this case the assignment was made three weeks after the execution of the bond. If it was not due then, how much longer could it stand over? Four, five or six weeks, or six months?

In short; no time could be fixed on, and there is no authority to support the distinction contended for.

No error.

Per Curiam. Judgment affirmed.

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(539) F. J. McMILLAN, Administrator, *v.* D. T. DAVIS *et al.*

1. Upon the trial of an issue involving the value of a jackass, it is competent to prove his reputation.

This was a civil action, tried before His Honor, Judge Mitchell, at Fall Term, 1871, of Alleghany Superior Court.

The action was upon a note given in 1864, to the plaintiff, for property, amongt which was a jackass.

On the trial, after evidence was introduced by plaintiff tending to show that the jack was worth $150, the defendant proposed to prove by one Reeves the reputation of the jack, and that the reputation was that he was worthless. This evidence was objected to by the plaintiff and rejected by the Court.

There was a verdict and judgment for the plaintiff and appeal by defendants.

Armfield, for the plaintiff.
Folk and *Busbee & Busbee*, for the defendants.

Reade, J. The question is, whether upon an issue involving the value of a jack, it is competent to inquire into his reputation. The case is not specific as to the particular in which it was proposed to prove his reputation, but we gathered from the argument, that it was as to his foal-getting qualities.

Indeed, it is a matter of common observation that, with

us, the value of a jack depends almost altogether upon that quality, as he is not useful for harness, or for the saddle, or for the turf.

We suppose that with all stock raisers there are two principal inquiries in selecting a sire: what is his pedigree? and is he a sure foal getter? Other qualities are judged of by inspection; these cannot be. How are these inquiries to be answered? The most usual and satisfactory, if not (540) only way, is by reputation.

A horse of the finest appearance and proportions would have but little patronage, with a reputation for inefficiency, or cold blood.

The famous horse, Sir Archy, if sold among strangers to his reputation, would probably have commanded only a few hundred dollars; with his reputation, he would have commanded many thousands.

There is error.

PER CURIAM. *Venire de novo.*

WILLIAMSTON & TARBORO RAILROAD CO. *v.* WILLIAM S. BATTLE.

1. CASE: A railway company having a right, by virtue of its charter, to locate its road-bed on a certain portion of the land of B, he proposes, by letter, that if the company will refrain irom such location, it may locate it over another portion of his land: *Provided*, it would open, grade and put in order a street on that part in front of his house eighty-five feet wide. The company accept the proposition, locate their road-bed accordingly, in December, 1869, but fail to open the street, etc., as late as September. 1871. The company became insolvent before September, 1871, and executed a mortgage of its property. In September, 1871, B. notified the company that unless the condition was performed within fifteen days, he should repossess himself of his land covered by the road-bed: *Held*:

(1). That the opening, etc., of a street was not a condition precedent to the exercise of the right ts locate.

(2). That the proposition contained in B.'s letter was not a mere license revocable at will.

(3). That while at law no easement passed to the company, because an easement in land can be created only under seal, yet, the writing by which the defendant charged himself was binding within the statute of frauds, and would be specifically enforced, and as between the parties and to protect the rights of the licensee, this Court acting upon the familiar maxim of equity, that what ought to be done is considered as done, would consider that a grant of the easement had been made.

2. A license even under seal (if it be a mere license) is as revocable as one by parol; on the other hand a license by parol, coupled with an interest and founded on a valuable consideration, is as irrevocable as if made by deed.
3. The license specified above is of the latter class.
4. The transaction may also be viewed as a contract, entitling either party to a specific performance.
5. The question of eminent domain does not arise, as all that was done was by the consent of B.
6. The insolvency of the company is immaterial, as any purchaser would take subject to all the burdens which were borne by the company.
7. The injury threatened is within the technical meaning of irreparable damage, and the company is entitled to have the injunction continued to the hearing upon the equity confessed in the answer, but it was erroneous to perpetuate the injunction before a final hearing.

This was an appeal from the Superior Court of Edgecombe County, at Fall Term, 1871, His Honor, Judge Moore, presiding.

The plaintiff, a railway corporation, commenced a civil action and presented an affidavit (sworn complaint) to His Honor, praying for an order of injunction.

This was granted, and at the term aforesaid, a motion was made to His Honor on affidavit to vacate the order.

The plaintiff made a counter-motion to perpetuate the injunction.

His Honor denied the former and granted the latter motion, and the defendant appealed.

The facts necessary to a correct understanding of the points are sufficiently stated in the opinion of the Court.

Battle & Sons, for the plaintiff.
Moore & Gatling, for the defendant.

(542) The alleged contract was the appropriation of land in a different place than where the law allowed it, except by the owner's consent; and the compensation agreed on was the performance of specific work for the owner.

2. The owner did not contract to waive his *security* for the compensation. If the road bed has been located by the company in rear of the dwelling, the land, or right of way, would have vested in the company, "so soon (and not before) as the compensation may have been paid or tendered." Sec. 18 of charter.

3. Such security is guaranteed by the Constitution, both

of the State and United States. By the Constitution of the State: *R. R. Co.* v *Davis*, 2 D. & B., 451, at pp. 459, 4, 60, 46, 1. By the Constitution of United States: Art. 1, Sec. 10, §1, which forbids the passing of any State law, "impairing the obligation of contracts." Though private rights, acquired by special grant from the State, may be taken for public use "in the exercise of the power of eminent domain," it can only be done by providing for a just compensation. If not so provided the taking would impair contracts. *State* v. *Glenn*, 7 Jones, 321; *Fletcher* v. *Peck*, 6 Cr. 128; *Stanmire* v. *Taylor*, 3 Jones, 207; *Cornelius* v. *Glenn*, 7 Jones, 512. The defendant held his land under grant from the State, and the state cannot grant it to another without compensation. 2 Kent's Com. and notes, 397 to 406, 8 edition. In such cases the Court will enjoin occupation till compensation is made. 2 Kent's Com. 399, N. A., Redfield on Railways, 147, 8, notes 5.

4. If the defendant had led the plaintiff into occupation and expensive improvements by a promise of gift, the Court would enjoin him from entering on the premises without paying for the betterments. *Baker* v. *Carson*, 1 Dev. & Bat. Eq, 38I. There is no pretence of allurement upon such terms. The plaintiff seeks to hold the land without a conveyance or payment just as if it were absolutely conveyed without compensation.

5. The proceeding, in substance, is a special equity
(543) application to enforce a contract. It is a demand for performance by the defendant, while the plaintiff not only declines to offer to perform, but admits its inability to do so. In other words the plaintiff calls upon the Court to protect its possessson of property, which it has entered on by false promises, and boldly asks the Court to sanction the act of injustice, because it is a Railroad Company and insolvent. The Company should have offered to perform its part of the agreement and placed itself within the power of the Court to enforce the performance, before it can have redress by injunction or otherwise. *Lane* v. *Patrick*, 3 Mur., 473; *Prater* v. *Miller*, 3 Hawks, 628; *Ellis* v. *Ellis*, I Dev. Eq., 398; *Falls* v. *Carpenter*, 1 Dev. and Battle Eq., 237; *Oliver* v. *Dix*, 1 D. and B. Eq., 605; *Albea* v. *Griffin*, 2 Dev. and Bat. Eq., 9, *Deaver* v. *Parker*, 2 Ired. Eq., 40; *McGalliard* v. *Aikins*, ib.; 186; *Suggs* v. *Stowe*, 5 Jones Eq., 126; *Capps* v. *Holt*, ib., 153. *Winton* v. *Fort*, ib., 251; *White* v. *Butcher*, 6 Jones Eq. 231;

RODMAN, J. The provisions of the charter of the company are only material so far as they may tend to explain the contract of the parties. The company had a right to condemn land for the use of their road, (yards, gardens, &c., excepted,) and they propose to run their road in the rear of the defendant's house, through his field. He, however, preferred that it should run in front of his house, and finally by his letter of 31st of May, 1869, he proposed to allow the Company to run their road in front of his house, and to leave the question of damages to the company, if it would open ,grade and put in order a street in front of his house, 85 feet wide, but the doing of this was not made a condition precedent.

It may be remarked here, that the company by its complaint, alleges a somewhat different contract from this. If there is really any controversy between the parties, as to the terms of the contract, that can be determined hereaf-
(544) ter. It is not material for the present decision, whether the terms stated in the complaint, are those stated in the defendant's letter of 31st of May, were those agreed on. We may assume therefore without prejudice to any future inquiry, that the terms were substantially to open and grade the street referred to, under the contract, the company laid down its track without any objection from the defendant, and have continued ever since to use it as a part of their road.

The Company also took some steps toward opening and grading the street, but never performed their contract in this respect, and in fact seem to have ceased work for the purpose, although it alleges in its complaint, that it still contemplated a performance.

On the 23d of Sept. 1871, the defendant notified the Company that unless it should within fifteen days begin to perform its agreement by making the street, &c, he would consider the agreement rescinded, and would retake possession of that part of the land occupied by the road. The plaintiff, thereupon filed their complaint asking for an injunction which was granted. Afterwards the defendant moved to vacate, and the plaintiff to perpetuate it. His Honor granted the last motion, and the defendant appealed.

We think there is no question here as to the power of the State to take property by virtue of its eminent domain, either with or without compensation. All that has been done here was by the consent of the defendant. Neither can there be

any question as to the right of both parties to the specific performance of the contract between them. If the plaintiff should bring action for such a purpose, it will be entitled to a grant of the right of way upon a performance of its side of the contract. And if the defendant desires to hasten the company in such performance, he can bring his action in which he will be entitled to have such performance within a reasonable time, or to have the contract rescined. The insolvency of the Company, and that it has made a mort-
(545) gage of all its property are immaterial as to the rights of the defendant. It has but an equity and it can convey nothing more, and whoever takes it, does so subject to the burden of being compelled to do equity before he can enforce it.

It is not a case, therefore, in which the defendent is without any relief, in case he cannot have the summary relief he desires and has threatened to take. The only question is whether he was entitled to that summary relief by rescinding the contract and taking possesion of the land, and we think he was not.

The only ground upon which the defendant's claim can be put, is that what passed between him and the company give it a mere license which he could revoke on its failure to comply with its agreement. The law upon this subject is well settled. In the clear and elaborate judgment of the Court of exchequer in *Wood* v. *Ledbetter*, 13 M. & W., 838, it is thus laid down: "A mere license is revocable, but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it, cannot in general revoke it, so as to defeat his grant to which it was incident.

It may further be observed that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol coupled with a grant is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But, where there is a license by parol, coupled with a parol grant or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is mere license; it is not incident to a valid grant, and it is therefore revocable. "The same rule prevails in Courts of Equity with this difference: that whereas the Courts of law require the grant to which the license is incident to be one valid at law;

a Court of Equity only requires that it shall be one that is regarded as a valid grant in that Court. In *Rerick* v. *Koons*, 14 Serg. & Rawle, 267, (S. C. 2 Am. L. C. 511,) the de-
(546) fendant had licensed the plaintiff to erect a structure on the defendant's land, by which a stream of water was diverted to the plaintiff's mill. There was no writing, but the plaintiff had been at expense in erecting the structure. The defendant afterwards attempted to revoke the license and tore down the structure.

The Court held the plaintiff entitled to damages, and say: "It is concluded that a mere license is revocable under all circumstances and at any times. But a license may become an agreement on valuable consideration; as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for valuable consideration."

The Court further said the plaintiff was entitled to the performance of the agreement in specie; that is to say, that there was there what a Court of Equity would regard as a valid grant, although a Court of Law would not. It must be remembered that in Pennsylvania the same Courts administer law and equity, and I suppose in the same forms

How now is it in the present case? It is clear that the license of the defendant to the company was not a mere license; it was given for a valuable consideration and was coupled with an interest. It is true that at law no easement passed to the company, for an easement in land can be created only under seal, But the writing by which the defendant charged himself was binding within the Statute of Frauds; it was a contract which, as has heretofore been said, this Court would specifically enforce. And more than that: between the parties and for the purpose of protecting the rights of the license, this Court upon the familiar maxim, that what ought to do done will be considered as done, would, if necessary, consider that a grant valid to create the easement has been made. We think the license was irrevocable. As the injury threatened comes within the technical meaning of irreparable damage,
(547) the injunction ought to be continued till further order. The judgment below is modified accordingly. But

this judgment will not prejudice any rights of the defendant if he shall institute an action for specific performance.

PER CURIAM. No error.

STEPHEN W. ISLER *v.* WILLIAM FOY and F. B. HARRISON.

1. Whatever may have been the rule under the former practice, under the provisions of the C. C. P., a landlord, let in to defend in a civil action for the recovery of land, is not restricted to the defences to which his tenant is confined, nor is this principle varied by the circumstances that the plaintiff is the purchaser at execution sale against such tenant, and that the latter was in possesssion at the date of the sale and of the commencement of the action.
2. The practice on this subject discussed and explained by Rodman, J.
3. It is well settled that retention of possession by the maker of a deed, forging the name of a witness to a deed and the like, do not *per se* render a deed fraudulent, but are circumstances to be weighed and considered by the jury.
3. Between 1860 and 1868 there was no period when a deed made in 1860 could not have been registered.
5. In actions to recover real estate brought against a defendant in an execution by a pcruhaser at a sheriff's sale of such property as the property of the defendant, in which a party claiming to be the landlord of such defendant, is permitted to defend, the plaintiff is entitled to judgment against execution defendant, but cannot be permitted to take out a writ of possession if he fails to recover as against the other defendant.

The cases of *Belfour* v. *Davis*, 4 D. & B., 300; *Howell* v. *Elliott*, 1 Dev., 76; *Leadman* v. *Harris*, 3 Dev., 144; *Sturdivant* v. *Davis*, 9 Iredell, 365; *Hardy* v. *Simpson*, 13 Ired., 132; *Scales* v. *Fewell*, 3 Hawks, 18, and *Hill* v. *Jackson*, 9 Ired., 333, cited and approved.

(548) This was a civil action, brought to recover possession of a tract of land, tried before His Honor, Judge Clarke, at the Spring Term, 1871, of Jones Superior Court.

Both the plaintiff and defendant Foy, claimed under the defendant Harrison, who disclaimed; plaintiff under a sheriff's deed executed in pursuance of a sale under execution of the land as the property of Harrison, on the 6th day of September, 1869. The defendant Foy claimed by virtue of a deed executed to him by Harrison, in December, 1860, and not registered until 1868: it was in evidence, in behalf of the plaintiff, that the name of the subscribing witness to the deed was a forgery, and also that Harrison had remained

in possession from the date of the deed to Foy until the commencement of this action.

The statement of the case does not distinctly show it, but it is assumed in the opinion, that Harrison remained in possession after his deed to Foy, agreeing to pay rent to Foy. The case does not state that any special instructions on the question of fraud were asked by plaintiff, but it is so assumed in the opinion, and it is to be understood, was conceded on the argument in this Court.

The statement is, that the plaintiff alleges that the deed is fraudulent, and that His Honor, after recapitulating the testimony, instructed the jury, that many circumstances enumerated, and amongst others, remaining in possession after conveyance, non-registration of deed and failure to pay rent to Foy, are badges of fraud, and His Honor left the question of fact for the jury. No exception is noted in the record.

The case states that the plaintiff "objects to the deed that it was not registered in due time," but the record does not show how His Honor disposed of the question.

The point of estoppel no where appears in the record, and it is presumed was made in this, *ore tenus*, without objection.

The record is much confused, consisting of the record proper. Judge's charge, with some sprinkling of a case, stated with a small charge interjected.

There was a verdict and judgment for the defend-
(549) ants, and the plaintiff appealed.

Shipp, for the plaintiff.
No counsel for the defendant.

RODMAN, J. The plaintiff excepts that the Judge below erroneously declined to give several instructions which he was requested to give.

1. That as Harrison was the defendant in the execution under which the plaintiff purchased, and was in possession at the sale, and at the commencement of this action, he could set up no defence against the plaintiff, except the invalidity of the execution, as to which there was no pretence. And also that Foy, being the landlord of Harrison, could make no defence that he could not.

It is conceded that if Harrison had been the only defendant, the plaintiff would have been entitled to the instruction

prayed for as to him. The plaintiff acquired by his purchase every estate and interest of Harrison in the land which are against him, was at least a right to the possession which he then held. So far the rule contended for is reasonable and supported by many authorities.

But it is not conceded that under our present practice, his landlord, Foy, who was made a co-defendant, was bound in like manner. Such was the rule in some cases in the former action of ejectment. But the purpose however for which the landlord was allowed to come in, viz.: that a trial might be had on the title, and to prevent a recovery by a collusion between the plaintiff and the tenant, was never lost sight of or sacrificed. Probably the rule only applied when the tenant had an unexpired term, in which case it would be perfectly just, as if the plaintiff recovered possession he would hold it as the tenant did, under an acknowledgment of the superior title of the land, or where the tenant had got possession as tenant of the plaintiff. *Belfour* v. *Davis*, 4
(550) D. & B., 300; *Knight* v. *Smythe*, 4 M. & S., 34, and in like cases. But, whatever may have been the extent of the rule formerly, we think that to apply it, except in the cases above supposed, or at least in a case like this, would be inconsistent with sec. 61, C. C. P., which requires or permits all persons claiming title or right of possession to real estate, to be made parties plaintiff or defendant, as the case may require.

Why permit a person claiming title to be made defendant, unless that he may plead separately and avail himself of every defect in the plaintiff's title? And a landlord must be permitted to do this as fully as any other person. It would be unjust to hold him bound by any estoppels created by his tenant, whether in form *in invitum*, as by judgment and execution, or willingly, as by a deed of conveyance of the land, or by evidence of the acts or declarations of the tenant in derogation of his title.

In actions for the recovery of real property, possession is an important element of the right, and it would be unjust to a landlord, whose title the tenant is estopped to deny, to allow any act of the tenant to have the effect of transferring the possession to any person who would not be estopped in like manner with the tenant. Where the tenant had an estate as a term for years, which passed to the purchaser under execution and was unexpired at the trial, the title of

the landlord to the reversion would be no bar to the plaintiff's recovery, and in such case the purchaser taking possession of the tenant's term, would succeed only to the tenant's right as between him and his landlord. But when the tenant has no estate but a barely permissive possession at the time of action brought, there seems to be no reason for allowing a recovery to have the effect of changing such possession to the injury of the landlord by virtue of any estoppel against the tenant, whether honest or collusive, because in such a case the possession would be in substance that of the landland, and not that of the tenant, who (551) would be more properly described as the servant or agent of the landlord, than as his tenant. We think the Judge was right in refusing the instruction prayed for.

2. That the possession of Harrison for so long a time after his deed to Foy without any actual payment of rent; and the fact that the name of the subscribing witness to the deed was forged, were not merely evidence of fraud to be left to the jury, but were fraudulent *per se*, and to be so pronounced by the Court. As to the forgery of the name of the witness, that is denied and has not been found by the jury, and we are not at liberty to have it proved. The Judge left the undisputed fact of possession, as well as the evidence respecting the forgery, fairly to the jury, as evidence upon which if believed they might find the deed fraudulent. We think in this he is supported by the authorities, *Howell* v. *Elliot*, 1 Dev., 76; *Leadman* v. *Harris*, 3 Dev., 144; *Sturdivant* v. *Davis*, 9 Ired., 365; *Hardy* v *Simpson*, 13 Ired., 132.

3. That the registration of the deed from Harrison to Foy which was in 1860, and not registered until 1868, did not relate back to its date, so as to pass the title against the plaintiff.

We find it decided that by virtue of the various acts which have been uniformly passed once in every two years extending the time for the registration of deeds, a registration at any time, relates back to the delivery of the deed, and makes it valid from that time; unless between its delivery and registration some period occurred during which it could not be registered, and during which a lien was acquired available to a purchaser under execution. *Scales* v. *Fewell*, 3 Hawks, 18; *Hill* v. *Jackson*, 9 Ired., 333.

No period occurred from the date of this deed to its registration, when its registration was not lawful. Hence, its registration in 1868 related back to its delivery in 1860, and

gave it effect from that time. [Acts, 1860–'61, ch. 31; Act ratified December, 1862; Act ratified 28th November, 1864; Act of 1866, ch. 55, p. 20, ratified 7th February, 1866]

The Judge properly refused the instruction.

(552) The plaintiff is entitled to judgment against Harrison, which he can have in this Court, but not to a writ of possession.

Otherwise there is no error.

Plaintiff will recover costs against Harrison, and Foy will recover costs of plaintiff in this Court.

PER CURIAM. Judgment affirmed.

B. M. ISLER *v.* JOHN S. ANDREWS, Sheriff.*

1. A sheriff, on a sale by him under execution, can demand *cash* of the purchaser, and on his refusal to pay it (even though such purchaser, as an execution creditor, is entitled to the proceeds of sale, less the costs, and offered to pay cash to the amount of the costs and enter satisfaction for the residue) may immediately re-sell.
2. Whether a sheriff so acting, arbitrarily, does not subject himself to an action, *quere.*
3. It seems that on a rule against a sheriff at the instance of such bidder to show cause why he should not execute a deed, the purchaser at a re-sale of the property ought to be made a party.
4. And, on the death of such sheriff, by virtue of the provisions of the Revised Code, chap. 37, sec. 30, the rule should be served on his successor.
5. Before such successor can be required to convey to such first bidder, he is entitled to demand clear and conclusive evidence that a sale was made by his predecessor and also that the price was paid to him.
6. The natural evidence thereof is the return, though it seems that other evidence may be received.

(553) 7. PER RODMAN, J., *arguendo*: Perhaps such bidder might (by procuring the determination of the proper Court, of his right to priority of payment out of the proceeds of sale and an order to enter satisfaction *pro tanto*, on his execution,) be regarded as having become the purchaser, but, *Held*: that in the absence of all such proof and in the face of a direct denial by such successor, no suchinference can be made.

8. Whether the execution creditor has any other remedy, *quere.*

The cases of *Owen* v. *Barksdale*, 8 Ired., 81, and *Harris* v. *Irwin*, 7 Ired.; 432, cited and approved.

This was a rule *nisi* originally obtained on O. R. Colgrove,

*This case was docketed B. M. Isler *v.* O. R. Colgrove, but to avoid confusion, as Colgrove had died and Andrews, his successor as sheriff, had been made party, his name is inserted for Colgrove's,

late Sheriff of Jones, requiring him to show cause why he should not execute a deed, as Sheriff, to the plaintiff for a tract of land sold by him under execution.

The salient facts necessary to a proper understanding of the controversy, appear to be: That on the 2d day of January, 1869, said Colgrove, having in his hands sundry executions, amongst which was one in favor of the plaintiff, which had priority of satisfaction, sold the land, and it was knocked down to the plaintiff at a sum less than his execution called for; he offered to pay Colgrove the costs in cash and receipt on the execution for the balance, but Colgrove having refused to accede to this proposition, and having demanded the full amount of the bid in cash, and the plaintiff having refused to pay his entire bid, or any more than the costs in cash, Colgrove immediately put up the land again for sale, when one D. D Colgrove, who knew of the plaintiff's bid, became the highest bidder; O. R. Colgrove made no return on the execution, nor did he or D. D. Colgrove pay the money into Court, but O. R. Colgrove, as Sheriff, executed a deed to D. D. Colgrove.

O. R. Colgrove died before a determination was had on the rule, and one Pearce first, and then present defendant Andrews, as his successor, respectively, were made parties defendant in his stead.

An answer was filed, stating that O. R. Colgrove had publicly proclaimed before the sale commenced, that ow-
(554) ing to the conflicting claims of the execution creditors, he should require *cash*, and should pay the same into Court and ask advice, &c. The rule coming on to be heard before His Honor, Judge Clarke, at Spring Term, 1871, of Jones Superior Court, he discharged the same, and the plaintiff appealed.

Shipp, in support of the rule.
No Counsel contra.

RODMAN, J. The plaintiff obtained a rule on the present Sheriff of Jones county to show cause why he should not make to the plaintiff a conveyance for a piece of land purchased by plaintiff at an execution sale, made in 1869, by O. R. Colgrove, then Sheriff of Jones county. The Judge finds in substance, that the Sheriff Colgrove sold the property of one Harrison at the time alleged; that he then had in

his hands a *ven. ex.* in favor of plaintiff against Harrison, and also several other executions in favor of junior *teste*; that plaintiff bid off the land for a less sum than the amount of his execution, and offered to pay the Sheriff the costs, and to authorize him to credit the amount of his bid on the execution, and demanded a deed. The Sheriff demanded cash to the amount of the bid, and as the plaintiff refused to pay, sold the land again when it was bid off by D. D. Colgrove, and the Sheriff made a deed to him, but never paid any money into Court. Sheriff Colgrove is since dead.

It would seem to be clear that if the conveyance from the Sheriff which is demanded by the rule is to have the effect of defeating the title of D. D. Colgrove, the second purchaser under plaintiff's execution, he ought to be party to it.

2. There is another objection to the present proceeding manifest on the plaintiff's case. The Rev. Code, ch, 37, sec. 30, says, that when any Sheriff has sold real or per-
(555) sonal estate, and has died before executing a conveyance, his successor in office shall execute it, and it shall be as valid as if made by the officer who made the sale.

But, necessarily, the succeeding Sheriff must have evidence that the sale was made by his predecessor, and also that the price was paid to him. In this case it is not stated that Sheriff Colgrove ever made any return of the execution under which the plaintiff purchased, and it may be the case that if any such return was made, so far from stating a sale to the plaintiff, it stated a sale to D. D. Colgrove. Now, before the present Sheriff can be required to convey the land to the plaintiff as the purchaser, the fact of the sale must be established by clear and conclusive evidence. The natural evidence would be the Sheriff's return. Other evidence it is said may be received (*Owen* v. *Barksdale*, 8 Ire., 81); but the recitals of a deed, certainly where a deed is made by a successor, would not be evidence. When we look at the plaintiff's statement here, it does not prove a completed sale. Every Sheriff's sale is upon the implied condition that the purchaser shall comply with the terms by paying the price; otherwise the Sheriff may immediately resell. Here the price was not paid (*Harris* v. *Irwin*, 7 Ire., 432). It may be that the Sheriff, in refusing to credit the plaintiff's bid on his execution in lieu of the cash, was guilty of a wrongful act, for which he became liable in damages. I

may also be stated, that if the plaintiff had procured the order of the proper Court, determining his right to priority of payment out of the fund, and an order to enter satisfaction *pro tanto* on his judgment, this would have been equivalent to a payment of the money. But can we say, at least in the absence of these things, that there was a sale, when the Sheriff says there was no sale, and refused to acknowledge the plaintiff as a purchaser. A Sheriff in selling land acts under a power. A Court of Equity will aid the defective execution of a power, when the possessor of the power intends to execute it and fails to do so by accident; but it will not supply an entire defect of execution, and (556) especially where there was no intention to execute.

We concur with His Honor; the rule must be discharged. Whether the plaintiff has any other remedy it is not for us to say.

PER CURIAM. Judgment affirmed.

STEPHEN W. ISLER *v.* ISAAC BROWN *et al.*

1. The wrongful refusal of a Court to permit a judgment oreditor to have execution of his judgment, does not operate (upon the abolition of such Court, pending an appeal from such refusal) to impair any lien acquired theretofore, or which might have been acquired thereafter, but for such refusal, under the maxim *actus legis nemini facet iujuriam.*

2. Hence, where, after judgment obtained in 1861, and executions regularly kept up thereon, a motion was made by a judgment creditor in 1866, in one of the late County Courts for execution upon his judgment, which was wrongfully refused, and pending an appeal therefrom, such Court was abolished, it was *Held:* that one who purchased from the judgment debtor pending such appeal, took the legal estate, but subject to such lien as would have been acquired, had execution issued.

3. In such a case, if the judgment creditor had not a complete lien upon the estate of his debtor he had at least an *inchoate* lien, with a right to perfect it by issuing an execution; his proceeding to cause execution to be issued, constituted a *lis pendens*, of which every one is held to have had notice, and a party purchasing from the judgment debtor pending the proceedings, is considered as dealing with him under exactly the same conditions, and subject to the same liens, as if the County Court had not refused an execution, and the same had been regularly issued.

4. The creditor so delayed must be placed in *statu quo*, and as a corrolary, any such purchaser is effected with notice by a presumption *juris et de jure.*

5. The above stated rule is founded on the maxim *pendente lite nihil in novetur*, and is sustained by considerations of public policy.

(557) 6. The doctrine of *lis pendens*, elucidated and applied to this case per RODMAN, Judge.

The cases of *Acock* v. *Harrison*, 63 N. C., 145; *Lee* v. *Gause*, 4 Ired., 9; *Isler* v. *Foy*, and *Isler* v. *Harrison*, at this Term; *Yarborough* v. *State Bank*, 2 Dev., 23, and *Calloway* v. *Hamby*, 65 N. C., 631, cited and approved.

Action to recover possession of certain tracts of land described in the pleadings, tried before Clarke, Judge, at Jones Superior Court, Fall Term, 1871, upon the following case agreed:

At August Term, 1861, of Wayne County Court, Aycock to the use of Isler recovered two judgments against F. B. Harrison and defendant, Cox, amounting to about $7,400, and costs. Executions were issued regularly from Term to Term, to the county of Jones, until the 4th day of March, 1864, when an *alias* issued to Wake county, returnable to November Term, 1864. From November Term, 1864, to November Term, 1865, an execution issued to the county of Jones, which was followed by other executions to Jones county until the 13th day of April, 1866, when an *alias* issued from November Term, 1865, to May Term, 1866, of Wayne County Court, which execution was levied upon the lands of F. B. Harrison. An *alias ven. ex.* with *fi fa* clause issued from May Term to August Term of Wayne County Court. Returned, "No sale on account of Stay Law."

At August Term of Wayne County Court, plaintiff made a motion for an *alias ven. ex.*, which was refused. Plaintiff appealed to the Superior Court and thence to the Supreme Court. Supreme Court decided, at January Term, 1869, that plaintiff was entitled to his motion.

The judgment, the record of the various executions and *ven. ex's*, the levy, &c, were regularly docketed in Jones county, 30th day of November, 1868.

An *alias ven. ex.* with *fi fa* clause issued, but no sale of the land in suit took place.

Subsequently, from Spring Term of Jones Superior Court, A. D., 1869, an *alias ven. ex.* with *fi fa* clause issued, (558) returnable to Fall Term, 1869.

On the 6th day of September, 1869, the land in suit was sold as the property of defendant, Cox, by the sheriff, after the tract of land of the defendant, Harrison, was sold, but admitted to be the same land. The plaintiff became purchaser and took the sheriff's deed on the 6th day of September, 1869.

Defendants claimed under a deed made by Wm. A. Cox, February 25th, 1867, to Isaac Brown, one made Dr. Wright, W. S. C. to Brown.

His Honor being of opinion with the defendant, rendered judgment accordingly and the plaintiff appealed.

Green, for the plaintiff.
Manly & Haughton, for the defendant.

RODMAN, J. Section 403 of C. C. P., says that existing judgments not dormant may be entered on the execution dockets of the Superior Courts, and that the subsequent proceedings shall be as prescribed, for actions hereafter commenced as far as compatible with the previous proceedings, "and no lien acquired before the ratification aforesaid (of C. C. P., August, 1868,) shall be lost by any change of process occasioned by this Act."

So that if the creditor under whose execution the plaintiff purchased, had a lien when he docketed his judgment in Jones county, which was in November, 1868, that lien was preserved.

It is needless to inquire whether the creditor acquired a lien prior to 1864, and whether that lien was lost by his omission to issue his execution to Jones county from Spring Term, 1864, or not; for executions were regularly issued to that county from November Term, 1864, and from each subsequent term down to August Term, 1866, when the creditor moved the County Court of Wayne for an *alias* execution, which the Court refused. He then applied to the
(559) Superior Court for a *procedendo*, which was refused by the Judge, and he then appealed to this Court—63 N. C., 145.

This Court said he was entitled to his execution from the County Court of Wayne, and to his writ of *procedendo* from the Superior Court, but as both those Courts had in the meanwhile been abolished, it was impossible for us to give that remedy then.

It admits of no dispute, that if the creditor had kept up an uninterrupted chain of executions down to the sale, they would have related back at least to November, 1864, and the purchaser would have the title which Cox had at that time, and would thus defeat the deed made to Brown in February, 1867.

The question then is, did the interruption in the chain of executions, caused by the wrongful act of the County Court of Wayne, have the effect of destroying the creditor's lien? We think it did not on the maxim, *actus legis nemini facit injuriam.*

The act of the law means of course the act of a Court. The case of *Pulteney* v. *Warren*, 6 Vessy 73, is a strong authority. The plaintiff had brought ejectment against Dr. Warren, and his action was delayed for several years, first by an order of the Court of King's Bench, and then by an injunction, which was finally dissolved, and the plaintiff obtained judgment in his ejectment. A few days afterwards, Dr. Warren died, whereby on the ground that a personal action dies with the person, the plaintiff was supposed unable to recover *mesne* profits. The bill was brought against the executor of Dr. Warren to recover these *mesne* profits. Lord Eldon said, "I agree, it is impossible to consider the mere circumstances of his (Dr. Warren's) death, as that species of accident against which this Court would relieve. It is admitted this case is new in its kind. It is contended, however, that this demand on the general principle can be supported by analogy to other cases.

I feel very strongly that this claim is founded on (560) natural and moral justice, and if it could be sustained from the general principle, the Court would be very strongly inclined to support it; but if it is to be determined on the general principle it must be decisively put upon that ground and not upon an analogy that will not hold."

He then considers the various analogies which had been suggested, and concludes that none of them hold, and puts the decision on the general principle which he thus states, "The case was also put of a creditor prevented from obtaining judgment by the act of this Court, and the question whether he ought to be considered a judgment creditor. I will not say what the answer might be to a case put so generally. A Court of law always takes care that a creditor so prevented shall be put in the same situation as if he had his judgment, and no such application had been made," &c., and continues, "the equity as to all of them (Dr. Warren and the other tenants) arises from their joint act, operating to prevent the plaintiff from having that redress at law, which in all probability he would have had, if this Court

had not interfered, and which in all moral justice he ought to have had," and he decreed an account of the *mesne* profits

It is on the same principle that Courts of Equity allow an obligee to recover interest beyond the penalty of the bond, when the obligor by protracted litigation has made the penalty insufficient. (2 Story, Eq. Jur. s. 1316), and give a creditor relief, notwithstanding the statute of limitations is a bar at law, when a suit at law has been delayed by the litigation of the debtor. Id. s. 1521, and when a party dies, after verdict and before judgment, and the judgment has been delayed by the inaction of the Court, the Court will give judgment *nunc pro tunc*. *Freeman* v. *Tranch*, 12 C. B., (74 E. C. L. R. 409.) *Lea* v. *Gause*, 4 Ire., 9.

But it may be said that however conclusively this case establishes the plaintiff's equity against Cox, who was the defendant in the execution, it does not extend a similar
(561) equity against Brown, who was an innocent purchaser and had no part in producing the interruption which was injurious to the plaintiff. In the first place, it will be remarked that there was no need to set up this equity against Cox, as the plaintiff had full legal right against him by virtue of his purchase at execution sale. But that legal right, being of the nature of a personal estoppel, would not bind Brown—*Isler* v. *Foy and Harrison* at this term As a foundation for an equity against Brown, it was necessary to show an equity against Cox, and it remains to be seen whether there is any principle in the law by which this equity can be extended so as to include Brown.

We think that the doctrine that a *lis pendens* is constructive notice, has this effect (Story, 1 Eq. Jur., s. 405), thus expresses the doctrine. "It is upon similar grounds that every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. And therefore a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will be accordingly bound by the judgment or decree in the suit."

But it is said by the learned counsel for the defendant, that there was no *lis pendens* about the property in dispute in the present action, and he refers us to the case of *Worsley* v. *Earl of Scarboro*, 3 Atk., 392, where the Chancellor says:

"If money be secured upon an estate and there is a question depending in this Court upon the right of, or about, that money, but no question relating to the estate upon which it is secured, but is wholly collateral matter, a purchaser of the estate pending that suit, would not be affected with notice by such implication as the law creates by the pending of a suit." The law is undisputed; its application to this case, however, is not admitted; certainly the land now in suit was not in litigation in the case concerning the refusal of execution. The right to have the execution against the defendants in that action (of whom the present defendant Cox (562) was one), was the property in litigation there; and although in some sense of the word, a right to have execution, may not be property, yet as used by Judge Story in the passage quoted, such a right is property. It comes within the reason of the rule.

In the present case if the execution creditor had not a complete lien upon the estate of the debtor, he had at least an inchoate lien with a right to go on and perfect it by reissuing execution, which the County Court refused to allow him to do, and from which refusal he appealed.

It is too well settled to be a question, that a *fi. fa.* is a lien upon the land of the debtor in the county to which it issues, from its *teste*, and this lien will be continued by the issuing of an *alias*, and *pluries*, etc., so that they will bind the land by relation to the original *teste*, as against any sale made by the debtor. *Yarborough* v. *State Bank.* 2 Dev., 23.

But for the refusal of the County Court, it must be presumed that the execution creditor would have duly continued to issue his execution (a *ven. ex.* with a *fi. fa.* clause) until he could procure satisfaction, or was stopped by a return of *nulla bona.* Therein the refusal of the County Court was injurious; it prevented him from keeping up his lien. Had his executions continued to issue duly, all persons dealing with the debtor for his land would have been held to have notice of them, and would have bought subject to them. Therefore, it is that, to prevent injury to the plaintiff in the execution from the act of the Court, and to put him in exactly the condition he would have been in but for that act, the Courts are obliged to hold that all persons had notice of the *lis pendens* respecting his right to have execution, and that they dealt with the debtor for his land, under exactly the same conditions, and subject to the same liens, that they

would have done if the Court had not refused execution, and the same had regularly issued. The party delayed by the act of the Court must be put *in statu quo*. Whoever
(563) bought the defendant's land during that litigation, bought with notice of it, and subject to its result.

It has been said by several writers, that this rule will sometimes work a hardship; and it has been urged that in this case it will do so. The rule, however, is founded on the maxim, "*Pendente lite nihil innovetur*," and is sustained by considerations of public policy. "*Privatum incommodum publico bono pensatur.*"

Under a system by which law and equity were administered by different courts, the remedy of the plaintiff in this case would probably have been by a bill to hold the defendant, Brown, a trustee for the plaintiff, and to require a conveyance from him. As the courts of this State now administer both jurisdictions without any distinction of form, the plaintiff would have been entitled to that judgment if he had asked for it. *Calloway* v. *Hamby*, 65 N. C., 631. As he asks for nothing but the possession, he can have judgment for that only.

There is error in the judgment below, which is reversed, and there will be a *venire de novo*.

PER CURIAM. Judgment reversed.

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(564) W. S. MASON *v.* ALFRED WILLIAMS.

1. One who has, and knows he has, title to property, who is present at a sale of it as the property of another, and who, when it is publicly announced before the bidding commences, that all persons claiming the same are requested to make known their claims, remains silent, is estopped afterwards from setting up his title against a purchaser for value at said sale.

2. One who accepts a deed for property, and claims and acts under it, knows all the facts constituting title, and intends to hold under it, if he can, has such knowledge as the law intends by that term, and every reason applies why it should be disclosed which applies in the very rare case of absolute knowledge that the title is good.

3. There is a qualification of the rule to the extent that the true owner must mean for the purchaser to act upon his representations, but one comes within this qualification even, who, by his conduct, whether it be fraudulent and *malo animo* or simply negligent and omissive, gives to others reasonable ground to believe that he has no claim (for in this connection title and claim are synonymous) to the property, and such others do so believe and act on such belief.

4. Not only *uberrima fides*, but that simple *bona fides* which the law exacts from every man, required the true owner to make known his claim at said sale, or never; he should have given all bidders the advantages he possessed from his exclusive knowledge; his omission to do so amounted to a negligence which imperilled the interests of others, and gave him an unfair advantage over them, enabling him, if he could, to buy low, and thereby secure an indisputable title, or, if another outbid him, to fall back on his reserved claim.

5. The registry of the plaintiff's title did not, *per se*, operate as notice to the purchaser.

PEARSON, C. J., and DICK, J., dissenting.

The cases of *Mason* v. *Williams*, 8 Jones, 478. *Bank* v. *Fowle*, 4. Jones Eq., 8, and *Sanderson* v. *Ballance*, 2 Jones Eq., 322, cited and approved.

This was an action of trover, under the old system, tried before His Honor, Judge Barnes, December Term (Special) of Wake Superior Court, 1867.

(565) It was brought to recover damages for the conversion of a steam engine. It was admitted that the title to the engine was, prior to 24th of July, 1851, in the firm of James F. Jordan & Co.; that on that day W. D. Cooke, one of the firm, conveyed his interest therein to one Pescud, as trustee, for sale, &c.; and that on the 7th November following J. F. Jordan, another partner, conveyed in trust his interest to one Jones. The firm consisted of other members besides Cooke and Jordan; the firm, however, by agreement retained possession of the engine till 1855, when, becoming insolvent, *they* conveyed it to one Benedict in *payment of a firm debt*, who passed the title to the plaintiff as a trustee, for sale. The plaintiff thus became invested with the title, and it was so conceded on the trial, and that his title continued unless by some matters *in pais* hereafter stated.

It was in evidence on behalf of the defendant, that Pescud was informed of the existence of the engine and where it was to be found, and was told by plaintiff that in his (plaintiff's) opinion he (Pescud) had title and ought to sell, and that he (plaintiff) set up no claim to it, and proposed to buy it of Pescud; that thereafter, Pescud in the meantime having notified the defendant, who was interested in his trust, of his purpose, offered for sale such interest in the engine as he as trustee could sell; he called on the crowd and asked, if any one present had any claim to make it known, and that the plaintiff was present in hearing distance at the time and remained silent; that plaintiff bid for the interest so sold, and was next to the highest bidder who was the defendant. It was also in evidence that plaintiff in his conversation with

Pescud acted with perfectly honest intentions, and was not aware of his title, but really supposed that he had no title, and only became better informed after a decision upon the point by the Supreme Court, made after the sale by Pescud.

There was conflicting evidence as to whether the plaintiff heard the proclamation, but it is unnecessary to go
(566) into the conflicting evidence on this and other points, as the verdict of the jury settled that matter.

There was a demand and refusal before suit.

His Honor instructed the jury, among other matters not excepted to, that if the evidence satisfied them that the defendant was induced to purchase by the declarations or acts of the plaintiff, the latter was *estopped* from impeaching the transaction, or if the defendant purchased the engine in consequence of what the plaintiff told Pescud, or in consequence of the conduct of the plaintiff at the time of the sale, the plaintiff could not recover; that they must be satisfied that the acts or declarations of the plaintiff were the active, inducing cause of the purchase, and that in the absence of such inducement, the defendant would not have purchased.

To this charge the plaintiff excepted.

There was a verdict for the defendant, and after an unsuccessful effort for a *venire de novo*, and judgment rendered, on the verdict, the plaintiff appealed.

Phillips & Merrimon, for the appellee.

For the general principle relied upon, the plaintiff cites *Pickard* v. *Sears*, 33 C. L., 257; *Phillips* v. *Imthum*, 1 C. P. L. R., 463; *Cornish* v. *Abbington*, 4 Hurl. & Norm., 549; *Freeman* v. *Cook*, 2 Exc., 654; *Dazell* v. *Odell*, 3 Hill (N. Y.), 219; *Marfad* v. *Bliss*, 12 B. Mon., 255; *Mople* v. *Kussart*, 53 Pa., 348; *Welland Canal Co.* v. *Hathaway*, 8 Wind., 483; Adams Eq., 151; Smith's Man. Eq., 60; Story's Eq. Jur., sec. 387; Smith Lead Cas., [1866] vol. 2, 742, &c; *Bird* v. *Benton*, 2 Dev., 179; *Governor* v. *Freeman*, 4 Dev., 474; *Jones* v. *Sasser*, 1 D. & B., 462; *Sasser* v. *Jones*, 3 Ired. Eq., 19; *Lentz* v. *Chambers*, 5 Ired., 587; *West* v. *Tilghman*, 9 Ired., 163; S. C. 8 Ired. Eq., 183; *Lamb* v. *Goodwin*, 10 Ired., 320; *Saunderson* v. *Ballance*, 2 Jones' Eq., 322; *Blackwood* v. *Jones*, 4 Jones' Eq., 54, and *Mason* v. *Williams*, 8 Jones, 478.

1. It is objected by plaintiff, that there can be no
(567) estoppel, as Pescud sold only *his interest*. *Pickard* v.

Sears, Lentz v. *Chambers,* and *Sanderson* v. *Ballance* (*ubi supra*) are to the contrary.

2. It is said that the Court below erred in not calling the attention of the jury to the *intention* of the plaintiff. The reply is:

(*a.*) The Court was not asked to do so. *Torrence* v. *Graham,* 1 D. & B., 284.

(*b.*) *Intention* is conclusively presumed from *acts.* Rosc. Ev., 20, 505; *State* v. *Jesse,* 3 D. & B., at p. 108.

(*c.*) No denial that plaintiff *intended Pescud to sell.* Therefore he *intended somebody to buy.* That "*somebody*" turned out to be the defendant.

(*d.*) *Estoppel* does not require *intention* upon part of the party estopped, but only an exercise of *will;* that his *mind is on* what he says—*advertence; Freeman* v. *Cooke,* and *Cornish* v. *Abington,* above.

3. As to plaintiff's *knowledge* of the state of his title:

(*a.*) He admits that he was *considering, weighing, doubting,* about his own title, during the time that he was suggesting the sale by Pescud, and saying nothing about his own claims.

(*b.*) *Ignorance* is no excuse where the party took an *active part,* as here, in bringing about the sale. Smith Chan. Eq., 60; Storey Eq. Jur., §387; Smith's L. C., 2, 753 and 769, *Stows* v. *Barker,* 6 John Ch., p. 169.

4. The record shows that the defendant was not interested at all under Jones' trust; and only partially under Pescud's, and therefore that he has lost the greater part of what he paid, if plaintiff be not estopped.

Fowle, for appellant.

RODMAN, J. This case was before this Court at June Term, 1862, on a case agreed, which will be found printed in full in 8 Jones, 478, so that it is thought unnecessary to (568) copy it here

Battle, J., delivering the opinion of the Court, undertakes to lay down what the Court then considered the true principle applicable to such a case, in the following words: "Where a person purchases a chattel from another, not the owner, and it is admitted by the parties, or found by the jury, as a fact, that the purchaser was induced to make the purchase by the declarations or acts of the true owner, the latter will be estopped from impeaching the transaction."

He proceeds: "If, then, in the present case, it had been stated as an agreed *fact*, that the defendant purchased the steam engine, in question, from Pescud, in consequence of what the plaintiff told Pescud, *or*, in consequence of the conduct of the plaintiff at the time of the sale, we should say that the latter cannot recover. That fact, however, cannot be inferred by the Court, from anything stated in the case agreed, and it must be left as a question for the jury, upon whatever competent and relevant testimony the parties may be able to produce on the trial."

Upon the new trial, the facts, stated in the case agreed, were substantially given in the evidence and the parties themselves were examined on oath. Their evidence supplied a few additional details. And it may be well to note here, that the defendant said that he did not recollect that Pescud had ever told him that the plaintiff had said he made no claim to the property. No inference, therefore, can be drawn from any supposed communication of this sort, from Pescud to the defendant. His Honor, Barnes, J., instructed the jury "that if the evidence satisfied them that the defendant was induced to make the purchase by the declarations or acts of the plaintiff, the latter was estopped from impeaching the transaction." The jury found for the defendant. The fact, therefore, which the Court had said was the only thing wanting to entitle the defendant to a judgment, was thus established.

The case was extremely well argued before us, on both sides, and we are indebted to the learned counsel for their assistance in coming to our conclusion.

(569) The counsel for the plaintiff contends now, that the rule announced by the Court, in 1862, and consequently the instructions of Judge Barnes, which followed it, were erroneous, inasmuch as it failed to include at least two of the ingredients necessary to raise an estoppel in the case supposed, and that as these two ingredients have neither been admitted nor found by a jury, the defendant is not entitled to a judgment.

The two facts which the plaintiff insists to be necessary to the completeness of the defense, and to be wanting, are:

First, That plaintiff should have had knowledge of his own title; and,

Second, That he should have meant to induce the defendant to believe that he (the plaintiff) had no title; and,

Third, He contends that if the defendant had equal knowledge of the plaintiff's title with himself, he could not be deceived or injured.

To all these propositions the defendant answers, that it does not appear that the points were made upon the trial, or that the Judge was requested to instruct the jury upon them, upon the doctrine that it is not error for a judge to omit to charge upon a point without being requested. It might be that the rule would not apply in a case like this, where it is contended that the charge laid down a rule which was erroneous by reason of its omitting the necessary qualifications. So, rather than rest our decision on a mere point of practice like that, we prefer to put it on the merits of the question. We concede the propositions of the plaintiff, provided they are properly understood, and we propose to state in what sense we think they are true. In their proper sense and meaning we think the existence of both facts must be inferred as matters of law from the facts stated in the case agreed.

1. *Knowledge by the plaintiff of his own title.*

In this case the title of the plaintiff existed by virtue of a deed of conveyance of the property to him, which he had personally accepted, and under which he had acted. It is true that the legal effect of that deed had not then been (570) adjudicated by a Court of final resort, as was afterwards done, (*The Bank* v. *Fowle*, 4 Jones' Eq. 8,) and its effect was a matter of controversy. But to give to the principle the interpretation that no one can be said to have a knowledge of his title until it has stood the test of judicial enquiry, would be pushing it to an absurd extreme, which finds no support in any authority. Here the plaintiff knew every fact constituting his title that he has knowledge of today. He claimed under that title, whether it should turn out good or bad in law, and intended to hold under it, if he could. He knew of his *claim*, and in the case of such knowledge, every reason applies why it should be disclosed under circumstances requiring its disclosure, which applies in the very rare case of an absolute knowledge that the title is good.

2. *That the plaintiff should have meant to induce the defendant to believe that he (the plaintiff) had no title*

We think the true rule upon this subject is stated in *Freeman* v. *Cooke*, 2 Wels. Hurls and Gard, 653, (2 Ex. R.) This has been referred to in several subsequent cases. *Howard* v. *Hudson*, 2 Ellis & Block, 175 E. (C. L. R.), and always, so far

as we know, with approval. We suppose that case to contain the settled expression of the English law. In that case Parke B, commenting on the case of *Pickard* v. *Seers*, where the language of the Court had been: "where one, by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, &c.," explains the meaning of the word 'wilfully' in that connection as follows: "By the word '*wilfully*' however in that rule, we must understand, if not that the party represents that to be true, which he knows to be untrue, at least, that he *means his representation to be acted on*, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making (571) the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."

In *Howard* v. *Hudson*, *ubi supra*, Crompton, J., says: "I think in every case in which we are to act upon, it must be brought within the principles so accurately laid down in the elaborate judgment in *Freeman* v. *Cooke*, &c." "As the rule is there explained, it takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word, not *malo animo*, or with the intent to defraud or deceive, but so far wilfully, that the party making the representation means it to be acted on in that way. That is the true criterion.

In *Cornish* v. *Abbingdon*, 4 Hurl. & Nor., 549, (Exch. R.), one Gover, who was in the employment of the defendant, but without authority to contract for him, did, nevertheless, contract with plaintiff, for certain work and materials, and the plaintiff believing that he was dealing with defendant, made out invoices for him, which he several times paid. The one on which the action was brought, he refused to pay. Pollock, C. B., says: "The jury having found that the defendant, whether intentionally or not, led the plaintiff to form an opinion that he was dealing with the defendant, and induced him to furnish goods to the defendant, the defendant must pay him for them." "If a party uses language, (or, we add, does acts) which, in the ordinary course of business and the gen-

eral sense in which words are understood, (or, we add, acts are interpreted) conveys a certain meaning, he cannot afterwards say he is not bound, if another, so understanding, has acted upon it." And Barnwell, B., says: "The rule is, that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it."

These cases, we think, clearly show what is the mean-
(572) ing of the rule, that the true owner must mean for the purchaser to act upon his representations. It is only, that, if by his conduct, whether that conduct be fraudulent and *malo animo*, or simply negligent or omissive, he gives to others reasonable ground to believe that he has no claim, (for in this connection title and claim are synonymous) to the property, and such others do so believe, and act on such belief, he is estopped afterwards to assert such title or claim. Indeed, the rule is general and of familiar application in relation to responsibility generally, as well as civily, for the consequences of one's acts. Every reasonable being is presumed *de jure* to intend the natural and reasonable consequences of his conduct.

Now, how does this rule apply to the facts which we must suppose to have been found by the jury in this case?

It is conceded that the plaintiff had no fraudulent intent, except that mere technical fraud, which may be implied from his conduct.

I put out of view any inferences which may have been attempted to be drawn from his telling Pescud that he had no claim; because the defendant swears that such conversation was never communicated to him.

I assume, for the present, that the defendant had no notice that the plaintiff had any claim to the property, because he swears he had not, and there is no evidence that he had.

The legal inference as to the meaning of the plaintiff must be made out entirely from his conduct at the sale. It was contended by his counsel, that inasmuch as the plaintiff bid for the property, he could not have intended to induce the defendant to bid over him, and consequently there can be no inference that he meant to injure the plaintiff. That is a misconception of the question, and of the defendant's intention. The defendant does not allege that the plaintiff really intended to induce him to bid, but that the reasonable effect

(573) of the plaintiff's conduct was to induce him to believe that the plaintiff had no claim to the property, and thereby to induce him to bid.

Having cleared the question of these irrelevant matters, I return to consider the plaintiff's conduct at the sale, and how far it falls within the rule of law before stated. Pescud offered his own right, and that of Jones in the property, for sale, and called on all persons who had any adverse claim to make it known. The plaintiff was in hearing and was silent, and afierwards bid for the property without making known his claim.

It seems to me, that not only the *uberrima fides*, which his counsel claimed for him, but that simple *bona fides*, which the law exacts from every man, required him to make known his claim then or never. The facts in this case are much stronger than in *Sanderson* v. *Ballance*, 2 Jones' Eq., 322, in which the Court held the defendant estopped to assert his title to land. There Thomas Ballance had conveyed by deed, professing to convey in *fee simple*, certain land to Carter in trust to sell to pay debt. Carter offered for sale the estate of Thomas Ballance, but said the title was good in fee. Thomas Ballance, in fact, owned but a fee in half the land, and a life estate in the other half, in which the defendant owned the reversion. The defendant was present at the sale; he was not summoned to make his claim; he did not bid; he was only silent; and the Court held it a fraud by which he forfeited his estate. It is not necessary in this case to go to the extent to which the opinion of the Court went in that: and possibly it went too far. It is found as a fact here, that the defendant was induced to buy by the conduct of the plaintiff; the question is, whether that conduct was not such as would reasonably induce the belief that the plaintiff had no claim to the property; or did the defendant draw an unreasonable and improbable inference from such conduct? It seems to me, that when brought to this narrow point, the matter will not admit of discussion.

Should not the plaintiff have made known his claims and given to all bidders the advantage he possessed from (574) his exclusive knowledge of that? Was not his omission to do so, a negligence which imperilled the interests of others, and gave him an unfair advantage over them? If he could buy low, his title would be indisputable; if

another bid over him, he could fall back on his reserved claim.

Third: That defendant had equal knowledge with the plaintiff, and so could not have been deceived.

This has been already briefly adverted to. The defendant swears that he had no knowledge of plaintiff's claim, and there is no evidence that he had, unless the registration of the deed to plaintiff was constructive notice. *Saunderson* v. *Ballance* decides that it was not. In that case, the deed from Caleb Ballance, which gave Thomas Ballance a life estate only, was registered, but Saunderson, the purchaser, was not held thereby to have notice of it.

The majority of the Court think there is no error in the record, and that the judgment must be affirmed.

PEARSON, C. J., *dissentiente.* The question will suggest itself to every plain man to whom the facts of this are made known: What has Mason said or done, that should cause him to forfeit a valuable property (the title to which has been decided by the Supreme Court to be in him) for the benefit of Williams, whereby Mason will be subjected to account for its value, as for a *devastavit* of trust funds?

The result of the case, after it has been pending in the Courts for years, and has been tried and argued over and over again, may in the opinion of many, seem to furnish an illustration of the fact, that good sense is sometimes shut out and smothered by too much learning.

It is not pretended, that Pescud was authorized, directly or indirectly, to sell the title of Mason. On the contrary, Pescud announced that he only offered for sale his own title and that of Jones, under their respective deeds of trust, and would make no warranty; so, the ground that the title
(575) of Mason passed, by reason of a *personal agency*, on the part of Pescud for Mason, is out of the case, so far as that can be made the basis of an equitable estoppel, according to the bearing of many of the cases cited, which are put upon the idea of a personal agency or assent.

The second ground for the equitable estoppel, by which Mason is to forfeit his title, is that of actual or constructive fraud; actual fraud is not alleged. Williams was induced to bid, because Mason bid—such is the finding of the jury; for Williams had avowed his purpose not to let the property go, unless at a fair price; in other words, he intended as a *party*

interested under Pescud's title, to bid it in, so when Mason bid $260, Williams was induced to bid $265. But this is not the good sense of the matter, and herein Mason has a right to complain that the case has not been put upon its merits. So there has been a failure of justice which entitles him to a *venire de novo.*

The question should have been presented to the jury in *this* point of view: Was it the intention of Mason to *induce Williams to bid for the property?* Was Williams thereby misled to his prejudice? so as to fix upon Mason a constructive fraud, by having intentionally or admittably, (as Mr. Phillips expressed it,) induced Williams to do an act to his injury, so as to make it against conscience for Mason after he became certified, that the title was in him, to set up claim to the property? I, of course, put out of the case the narrow view that Williams was *induced to bid*, because he did not intend to let Mason buy in Pescud's title, at what he considered an inadequate price.

1. Was it the intention of Mason to induce Williams to bid for the property? All of the evidence disproves this intention. So far from that being the case, it was Mason's purpose to buy in the title of Pescud, in order to remove a cloud and quiet his own title; so, of course he did not wish Williams or any one else to bid, and but for a high sense of honor (576) and fair dealing, he would have attempted to prevent it, by answering that, "he also held a deed of trust on the property, but would bid a small sum to get in Pescud's supposed title, and whoever should bid against him must take the chances." Instead of pursuing this disingeneous course to try and get Pescud's title at an under value, he bid, as far as he thought Pescud's title was worth, and left the field open for Williams and all others who might choose to bid. For this, Mason is now charged with constructive fraud. I will venture to say, there is not one man in ten who would have acted as fairly. Nine men out of ten, would have talked about their deed, case still pending in the Supreme Court, willing to make a bid to end the dispute by buying in the outstanding title, &c.

2. *Was Williams misled*, by what Mason said and did, to his prejudice? How was he misled by Mason? Did he have any communication with Mason or confide in him? How was he misled by Mason? Pescud, after talking to Mason, consulted with his counsel, and concluded to sell his title at

auction, and communicated this fact to Williams. Williams being the party interested, determined to attend the sale and make the property bring a fair price or bid it in, thus far there is no semblance of *misleading*. Surely, the fact that Mason bid for the property after Pescud had announced that he sold only the title under the trust to him and Jones, had no tendency to *mislead* Williams. Williams has got what he bid for, to wit: the title of Pescud and Jones—how can he now claim, under that bid, to have become entitled also to the title of Mason?

JUSTICE DICK concurs in this opinion. JUSTICE BOYDEN concurs in the principles set out, but feels bound by the verdict of the jury.

I feel it to be a duty to file this opinion, in order to protest against a precedent, that no man can bid at a public auction, with the purpose to quiet his title, without incurring a forfeiture of that title.

PER CURIAM. Judgment affirmed.

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(577) BARBARA ALEXANDER *et al v.* PETER A. SUMMEY *et al.*

1. A will is made in these words: I direct that my debts and funeral expenses be paid. I will and bequeath to my son, Peter A. Summey, twenty-five hundred dollars. I will and bequeath to my wife, Harriet Caroline, my house and lot in Lincolton in which I now live, my plantation about one mile from Lincolnton, and my household and kitchen furniture, for and during her natural life, and a sufficient quantity of property or money for a year's support for herself and family. I also will absolutely to my wife the following slaves, Sophia, &c.; also all the balance of my estate, both real and personal, with the remainder after my wife's death, in my house and lot, plantation and household and kitchen furniture, to be equally divided between my children George L. Summey, Caroline Dusenberry, Barbara Alexander and Peter A. Summey, with the understanding that the negroes I have already given to my son George shall be taken into account in said distribution. * * * * * * * *Held*, that the leading idea in the testator's mind was to make all of his children equal with an advantage to his son Peter A. Summey, to the extent of $2,500.
2. The will having been made in September, 1864, when Confederate money had become so depreciated as not to deserve the name of a currency: to construe the legacy to Peter as payable in Confederate currency would be to "mock," the legatee, therefore, *held*, that Peter's legacy must be estimated at its nominal value in good money.
3. On the other hand, the major part of the testator's estate having consisted of slaves which were lost by emancipation, it would not carry out the testator's intention to pay Peter's legacy in in full, and leave

nothing for the other legatees, therefore *held*, that Peter's legacy must abate proportionality.

4. The rule of proportion is: To ascertain the value of the whole estate at testator's death, and the proportion that Peter's legacy of $2,500 bore to that sum, is the proportion it bears to the estate as reduced.

5. After deducting the sum due to Peter on his legacy, as thus abated, the balance is to be divided into three parts, between the daughters and Peter, unless George shall elect to bring his advancements into hotchpot, in which case the remainder must be divided into four parts.

The case of *Lassiter* v. *Wood*, 63 N. C., 360, cited and approved.

This was a civil action brought to obtain a construc-
(578) tion of the will of the late Peter Summey, of Lincoln County. Proper parties were brought before the Court, and the cause was heard before His Honor, Judge Logan, at the Fall Term, 1871, of Lincoln Superior Court.

It was conceded that the testator had supported the plaintiff, a widow and her children for a number of years; that his other daughter, Mrs. Dusenbery, was well off, and that George had been well advanced in slaves before the war; that Peter A. was the youngest, and had lived with his father without reward, and attended to all of his business up to the time of his death.

The following interrogatories were propounded to His Honor by the counsel for both parties.

1. In what kind of money is the pecuniary legacy to Peter A. Summey to be paid?

2. Does it bear interest; if so, from what date?

3. If it is to be paid in good money, out of what property is the amount to be raised, or on what is it chargeable?

4. Is the legacy subject to scale or abatement on account of the emancipation of slaves or other causes, or is it entirely lost?

5. Is the 4th clause in the will, specifying that the house and land shall be sold, a specific legacy, and does it abate it in favor of the general pecuniary legacy of $2,500?

To which His Honor responded as follows:

"In this case it is the opinion of the Court that the devisees under the 4th (residuary) clause of the will, take the real estate without any abatement in favor of the pecuniary legacy of $2,500 to Peter A. Summey," and gave judgment accordingly, from which Peter A. Summey appealed.

Bynum and *Hoke*, for the plaintiff.

The devise is specific, the will itself shows it. *Robinson* v *McIver*, 63 N. C., 645.

(579) All devises of land are specific. Redfield on Wills, Part II, p. 471. Ambler Rep., vol. 1 pp. 171, 173.

This legacy of $2,500 is not a charge on the land, and in the case in 6 Jones Eq., does not apply. The clerk's report shows an abundance of property to pay debts, pp. 37, 38, transcript. *Johnson* v. *Farrell*, 64 N. C. 266.

Schenck, with whom was *W. H. Bailey*, for Peter A. Summey:

The general pecuiary legacy of $2,500, means good money. Scale law, Acts 1866, ch 39, does not apply to wills, and see *Lackey* v. *Miller*, as to meaning of the word dollar.

Barham v. *Gregory*, Phil. Eq. 243. Legacy to child bears interest from death of testator. *Swann* v. *Swann*, 5 Jones Eq. 297. *Ballantine* v. *Turner*, 6 Jones 224.

The 4th item in the will is a residuary clause, in which personality and realty are blended, and embraces only "what is left," after paying the general pecuniary legacy of $2,500. *Givins* v. *Givins*, 1 Mur. 192. 16 How. R. p. 1.

This clause of the will does not fall within the exception made in *Robinson* v. *McIver*, 64 N. C. 645.

1. No annuities are charged on the residuum

2. No specific directions for managing the property are given repelling the idea of sale to pay legacies.

The object and intention of testator was to make Peter A. Summey equal by $2,500 legacy with George, who was advanced, and Barbara whom he had supported; this will be defeated by construing the devises to be specific.

There is no abatement by loss on negroes. This case is distinguished from *Taylor* v. *Johnson*, 63 N. C., 381; *Johnson* v. *Farrell*, 64 N. C., 266.

In both of those cases there was enough personal property undevised to pay the debts and legacies *when testator died*—in our case there was none to pay debts even, and it must come out of the *residuum*.

(580) Executor is not responsible for loss of slaves in January, 1865. *Finger* v. *Finger*, 64 N. C., 186.

Court may consider the state of the family in construing this will. *Watkins* v. *Flora*, 8 Ired., 374; *Bivens* v. *Phifer* 2 Jones, 436.

I submit that the defendant, Petter A. Summey, is entitled to have his legacy of $2,500 raised, if not in whole, at least in part out of the real estate disposed of in the residuary clause under the doctrine of marshalling.

1. For, in our case the testator disposes of *all* his estate and, to prevent him from "being mocked," his legacy is a charge upon the specific bequests. This is well settled and is consonant with the opinion of the Court and also that of the Chief Justice, *dissentienta*, where the whole learning is thoroughly discussed in *Biddle* v. *Carraway*, 6 Jones Eq., 95.

2. Previous to our act subjecting real estate to be sold for all debts, it was well settled in England that if bond creditors exhaust the personal estate, legatees are entitled to be paid out of the realty—where the testator has directed his debts to be paid as in our case—because creditor had two funds &c. 1 Roper on Leg., 622, also p. 637; *Foster* v. *Cook*, 1 Bro. C. C., 347.

3. Our act above referred to, extends the principle to all debts, because it subjects the real estate to debts without reference to their dignity—hence, if debts exhaust the personal estate, the legacy should take their places against the realty. This doctrine has been fully sustained in Pennsylvania. Armstrong's appeal, 63 Penn., 308.

Equity disregards the shadow and deals out substantial justice.

In our case, as shown by the testimony, which is *all* by consent to be treated as facts inferentially from the report, that the personal property was wholly insufficient *at the death of testator*, to pay debts, even had all the slaves been sold,

(581) which gives the specific legatee of personal property a right to be subroagted to the rights of the creditors for contribution against the real estate. Why should not the pecuniary legatee, then, by reason of his charge, on the specific legacy taken, be subrogated to the equities of such legatee, and thus avoid multiplicity of suits and effect a complete decree?

If it be otherwise, then the specific legatee stands in the better situation by losing his legacy—for, if not taken to pay debts, he looses it by way of charge. If taken to pay debts, however, he would get its value, *reductio ad absurdu.*

In equity a judicial conversion works no wrong, therefore, that which is instituted is stamped with all the legal incidents which affected the thing converted.

READE, J. The testator left a widow and four children. He gives first, $2,500 to his youngest son, Peter. He then gives a legacy to his widow, and then divides the residue to his four children, including Peter, share and share alike, his oldest son George to account for an advancement to him.

The widow is dead, so that it would simplify the statement to say, that he gives his youngest son, Peter, $2,500, and then divides the residue among all the children, including Peter.

It is plain, from this statement, that the leading idea in the testator's mind was to make all his children equal, with an advantage to his youngest son of $2,500.

The testator was old, and we are not informed that he was of more than ordinary intelligence, and as he was near death, and did soon die, we suppose that he was looking to the distribution of his estate, as it had for a long time been, and as it then was without reference to the casualties of the war, of which he took no notice. But soon after his death, and before there could have been a settlement of his estate, the slaves, which constituted the largest part in value of his estate, were emancipated, and there was little left except the land, worth about $5,000.

About half of that amount was required to pay debts, and if the other half is taken to satisfy Peter's legacy of
(582) $2,500, nothing will remain for the other children.

Was such a result contemplated by the testator? Clearly not. And such a construction of his will would make him "turn in his grave." And on the other hand, to give Peter his legacy in Confederate money, or its value, about $50, would be to "mock" the favorite of his bounty. The general rule is, that a legacy is payable in the currency of the country at the date of the will; but here we had no currency, Confederate notes having become so far depreciated as not to deserve the name, therefore Peter's legacy must be estimated at its nominal value in good money, $2,500. But, then, it must abate so as to bear its share of the loss by emancipation of the slaves. It must bear the same proportion to the estate, as it is now left in the hands of the executor, as it would have to the whole estate, if it had not suffered the extraordinary casualty of emancipation. For illustration: if the estate would have been worth $10,000, without the casualty, he would have been entitled to his legacy in full, $2,500. If it is reduced by the casualty to $5,000, he must take but $1,250.

The general and leading intention of the testator must pre-

vail where it can be collected from the will itself; and particular rules of construction must yield something of their rigidity if necessary to effect this purpose. *Lassiter* v. *Wood*, 63 N. C. R., 360.

According to the construction which we put upon this will, in order to carry out what appears to have been the leading purpose of the testator, it must (1.) be estimated what would have been the value of the whole estate, embraced in the residue before taking out Peter's legacy, and to be divided after the payment of the debts and expenses of administering, if the extraordinary casualty, emancipation, had not happened. (2.) Estimate what proportion $2,500 would have been of that sum. (3.) Ascertain the net amount of the estate now in the executors hands, after paying debts and expen-
(583) ses, and take out of that sum the same proportion for Peter's legacy, and then (4.) divide the remainder into three equal parts among three children, including Peter, and leaving George out, unless George will come in and account for the advancements, and in that event, then into four parts.

This view makes it unnecessary to answer the questions propounded specifically; and we notice the case states that it is desired that this Court should construe the whole will.

This will be certified, to the end that there may be proceedings to ascertain the amount in the hands of the executor, and a satisfaction of the legacies, in conformity with this opinion. The costs in this Court will be paid by the executor, out of the funds of the estate.

PER CURIAM.

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(584) W. H. LAWRENCE *v.* MALISSA STEEL *et al.*

1. There is no formula by which Judges are bound in charging upon the degree of mental capacity sufficient to make a will.
2. A charge that a testatrix must have had mind and intelligence sufficient at the time she executed the will to enable her to have a reasonable judgment of the kind and value of the property she proposed to will, and to whom she was willing, is not erroneous, especially in a case where there was evidence of undue influence as well as incapacity; nor was it rendered erroneous, though given in connection with a refusal to give a prayer embracing *in ipsisimis verbis*, a definition of such capacity which had been approved by the Court.
3. It seldom does justice to the Judge, or the case, on trial to select isolated expressions which have been held to be proper in other cases, and

insist upon their being used by the Judge in his charge, because it is seldom that two cases are exactly alike, and if they are, and a charge in the first case has been approved by the appelate Court, *non constat*, that it would not have been approved if expressed in other language.

4. If, on the trial of an issue of *devisavit vel non*, the will is attacked on the ground of undue influence, and false representations whereby the testatrix, as declared in the paper-writing propounded, was induced to believe that all of her relatives had joined in proceedings to declare her a lunatic, it is competent for the caveators to introduce the record of such proceedings, to show that only a portion of the next of kin had instituted them.

The case of *Horne* v, *Horne*, 9 Ired., 99, cited and commented on, and the case of *Wood* v. *Sawyer*, Phil. Law, 251, cited and approved.

This was an issue of *devisavit vel non* as to the validity of a script, propounded as the will of Prudence Cowan, and was tried at Fall Term, 1871, of Catawba Superior Court, before His Honor, Judge Mitchell and a jury.

The script was caveated on the ground of mental incapacity and undue influence, and false representations in connection therewith. In one clause of the script the testatrix declared "as a reason why I have thus disposed of my effects is this, that my relatives from whom I might have expected acts of kindness and words of comfort in my old age,
(585) have undertaken to prosecute an inquisition of lunacy against me, and to deprive me of the control of my property, &c."

On the trial the caveators offered in evidence the record of the inquisition referred to by Mrs. Cowan, for the purpose of showing that only two and not all of her relatives had joined in the proceedings, with a view to establish the false representations charged by them to have been made to Mrs. Cowan. This evidence was received after objection.

There was evidence tending to show undue influence and mental incapacity, and rebutting testimony.

His Honor was requested by the propounder to charge the jury, "that if Prudence Cowan knew what she was doing at the time she executed the alleged will, and to whom she was giving her property, she had sufficient capacity to make a will." This instruction was declined by His Honor, who charged the jury, amongst other matters not excepted to, "that the testatrix must have had mind and intelligence sufficient at the time she executed the will, to enable her to have a reasonable judgment of the kind and value of the property she proposed to will, and to whom she was willing it." The propounder excepted thereto. There was a verdict in favor

of the caveators, and from the judgment therein rendered, the propounder appealed.

Phillips & Merrimon and *Armfield*, for the appellant.
Schenck (with whom was Bailey), for appellee,
Bynum, for the appellee, filed the following brief:

1. The petition of lunacy was competent for the purpose for which it was offered, to-wit: to show who are the parties to it, and that the suit was pending. The suit was referred to in the will, and falsely charged to be prosecuted by all the heirs and next of kin, and that in that suit, the propounder acted as the only friend of the testatrix. This evidence is offered under the defence of undue influence. If the Judge charges the law substantially correct, the refusing cor-
(586) rect instructions, it is not error.

Here his charge embodies in different language, the definition of competency laid down in *Horn* v. *Horn*, 9 Ired., 99; *Moffat* v. *Witherspoon*, 10 Ired., 185, and *Cornelius* v. *Cornelius*, 7 Jones, 593. See Redfield on Wills, 122, 3, 4, 6, 7, and notes. This author while adopting the definition which the Judge laid down in this case, at the same time refers to the definition in *Horne* v. *Horne*, as being the most concise definition of testamentary capacity and in substance the same. See note above. I. Williams on Executors, p. 16 and notes.

READE, J. It has been often said by this Court, that a judge need not charge in the very words of the prayer for instructions, even if the prayer be right, provided he do so substantially in other intelligible language. And it seldom does justice to the Judge or to the case on trial to select isolated expressions, which have been held to be proper in other cases, and insist upon their being used by the Judge in his charge, because it is seldom that two cases are exactly alike, and if they are, and a charge in the first case has been approved by the appellate court *non constat* that it would not have been approved if expressed in other language. It is seldom, indeed, if ever, that any precise language can be established as a *formula* in such cases. That which probably comes as near to such *formula* as any other, is, that in criminal cases, the jury must be satisfied beyond a reasonable doubt. And yet it has been often held that any equivalent words will do.

In the case before us the plaintiff asked His Honor to charge that if the testatrix "knew what she was doing at the time she executed the alleged will, and to whom she was giving her property, she had sufficient mental capacity to make a will." His Honor declined to give the instructions as prayed for, but charged the jury "that the testatrix must have had mind and intelligence sufficient, at the time (587) she executed the will, to enable her to have a reasonable judgment of the kind and value of the property she proposed to will, and to whom she was willing it." And then His Honor proceeded in the same connection to charge in regard to undue influence, which was not excepted to and not embraced in the plaintiff's prayer.

And now, the plaintiff insists that he was entitled to the specific charge prayed for, and he seeks to give point to his exception to the charge, upon the ground that his prayer is in the very words of *Horne* v. *Horne*, 9 Ired., 99.

That in that case the Judge below charged in the words of his prayer, and that this Court, on appeal, affirmed it; and thereby established a *formula*, which His Honor ought to have used in this case. And that it was error, if not contumacy, to refuse.

It is true, that the prayer of the plaintiff in this case is in the language of the charge in *Horne* v. *Horne*, and it is true that the Supreme Court said in that case, "that the appellant had no right to complain at what was then laid down;" but there was no criticism, favorable or otherwise, upon the language as being well or ill-selected, and no intimation that it had been, or ought to be a *formula*. And if the language of the prayer of *Horne* v. *Horne*, be criticised, we would suppose that the Court *tolerated*, rather than approved it. It is least liable to the objection of tautology, for the latter part is embraced in the first. Why not stop at "if she knew what she was doing." Why add, "and to whom she was giving her property?" For that was a part of what she was doing. In further support of the language of *Horne* v. *Horne*, it is said that it has been quoted by a reputable text-writer, as the best definition of testamentary capacity. It is true that Redfield does quote Horne's case with approbation, but he does not prescribe it as a *formula*. And here note the danger of the propounder of a good will insisting on Horne's case. It is true, that no will ought to be established unless the testator has capacity to understand what

he is doing; but have not many wills been estab-
(588) lished where the testator had ample capacity to understand, but who was laboring under some mistake of law or fact, so that he did not know what he was doing? In the case of *Johnson's will*, Phil. Law R., which was established, the testator disinherited a relation, assigning as his reason for it, in the will, that he was a gambler, when in truth he was not a gambler. The testator was mistaken, and in that sense he did not understand what he was doing; yet, because he had capacity to understand, his mistake did not invalidate the will.

And so we were informed in the argument, that the will in this case, gives two parcels of land to two favorites of the testatrix, of "homesteads," 25 acres each, to be laid off on the west side of her land, beginning at such a point, and running to another point, and so on; and that each tract so laid off would be entirely worthless for a homestead, as it would be about a mile long, and only a few yards wide. Now it is impossible to resist a conviction that she did not know what she was doing. The draftsman of the will did not think, or else did not explain to her what would be the shape of the land. And if it had been explained, she would doubtless have said: "Oh, I did not think of that, I do not want it given in that shape." She evidently did not know what she was doing, and yet the propounder of the will was insisting upon *Horne's case!* And just as strange, the other side was resisting *Horne's case*, although it was decidedly in their favor. So that, according to *Horne's case*, it would seem that neither of the parties in the cause could make valid wills, because they did not know what they were doing, how large soever their capacities to understand must be admitted to be. So that we think His Honor laid down the rule more favorably for the plaintiff than *Horne's case*, and with more general applicability to the whole case.

The substance of the charge was, not that the testator must have known, but that she must have had capacity
(589) to understand what she was doing. The language is "must have had mind and intelligence sufficient, etc," mind and intelligence means capacity, so the charge in substance was, "must have capacity to enable her to have a reasonable judgment of the kind and value of the property," etc.

His Honor probably had another reason for selecting his

own language, instead of using that in *Horne's case.* There was an allegation and there was evidence of undue influence; and the prayer of the plaintiff did not embrace that view of the case, and it was the duty of His Honor to connect his charge upon capacity with that upon undue influence. And although we think the case warranted his putting it more strongly against the plaintiff than he did, yet the plaintiff cannot complain of that.

The record of the application to have the testatrix declared a lunatic, on the part of her next of kin, was offered of evidence, that only two and not all of her next of kin, had instituted the proceedings, and that she had been imposed on in being made to believe that *all* of her relations had proceeded against her, and that under that erroneous impression she had disinherited them all, and given her property to strangers.

This was competent upon the point of undue influence. But it was a two-edged sword; for while it tended to show undue influence, it also tended to show capacity, and the plaintiff doubtless availed himself of it at the trial.

There is no error.

PER CURIAM. Judgment affirmed.

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(590) HENRY WHITTED, Guardian, *v.* HENRY K. NASH *et al.*

1. If a simple contract creditor receives payment of the executor, a bond creditor cannot afterwards, either at law or in equity, compel the simple contract creditor to refund, for both are creditors, and the creditor first paid may with good conscience retain the money, and leave the bond creditor to his action as for a *devastavit.*

2. Nor is this principle varied by the receipt of property in satisfaction, instead of money; *Provided,* the property is taken at a full price, *bona fide* and without notice, that the executor is contriving to defeat the priority of the bond creditor.

3. CASE: The daughter of a decedent, being very solicitous to cause his debts to be paid, on being assured by the executor that her own and his [the executor's] debts are the only ones outstanding, buys from the executor certain property, and executes her notes to certain persons, creditors of the executor, and it afterwards appears that the testator owed the other persons; *Held,* that these facts warrant a recision of the transaction.

4. When a pleading shows that parties, other than those of record, have an important interest in the decision of the cause, the omission to set out their names is an inexcusable error, as a complete decree cannot be made without their presence before the Court, and the Court cannot see under the general phrase "certain parties" who they are.

5. In the case above stated, our Courts having refused to adopt the doctrine of the English Courts, by which a purchaser from a fiduciary is compelled to see to the application of the purchase money—had the purchase money been paid, the purchaser would have been protected in her title, but as the purchase money has not been paid, the fund will be arrested and applied in a due course of administration.

This was a civil action, tried before His Honor, Judge Tourgee and a jury, at Fall Term, 1871, of Orange Superior Court.

The facts, as shown by the record, are these:

H. K. Nash, Edmund Strudwick and the late Judge Nash executed a note to the plaintiff, as guardian; that afterwards Judge Nash died testate, leaving said Strudwick his executor; that after his death a note in renewal was executed by (591) H. K. Nash and Strudwick, and also signed by Strudwick, as executor. On an issue to the jury it was found that the plaintiff had never accepted the note offered in renewal; by the will of Judge Nash, his executor was authorized to sell his real estate, and in pursuance of this authority the executor on the 15th of February, 1867, sold to Miss Sallie K. Nash, daughter of the testator, the residence in Hillsboro, and the "coal-field" lands on Deep River, and executed deeds therefor; the price of the residence was $3,550, and the coal-fields $4,015; that Miss Nash did not desire to purchase the coal-fields, and did so merely because Dr. Strudwick, the executor, had informed her that the only debts remaining due by the the testator were two, viz: one due to herself of $3,550, and one due to himself of $4,015; and that it would be necessary to pay the debt due to him before that due her could be reached; and that, acting on this assurance, she consented, in order to save the homestead, to purchase also the coal-fields.

The homestead was to pay her debt; her debt was a simple contract debt, as, in the main, was that of the executor. In payment of the coal-fields, Miss Nash, on the 1st of April, 1867, executed her notes to "certain persons," who were creditors of the said Strudwick, to whom he had assigned, by deed in trust, his claim against the estate of his testator. The jury on issues found the purchase of the homestead and the coal-fields to be a single transaction. In 1866, Strudwick became insolvent, and H. K. Nash was also insolvent; that the only property belonging to the testator was the property so conveyed by his executor, and a claim for the use and occupation of the homestead after his death by Miss Nash.

Upon the finding of the issues as before stated, His Honor being of the opinion with Miss Nash, rendered judgment accordingly, and the plaintiff appealed.

J. W. Graham, for the appellant.

Miss Nash was informed that the debts must be paid
(592) before she could get good title. If she chose to rely upon the statements of the executor she must discharge any other debt not mentioned. She became paymaster and must carry out her bargain. Much less than actual knowledge is sufficient; if anything appears which is calculated to excite attention, the party is put upon inquiry and is affected with the knowledge of all that diligent inquiry would have brought to light. *Bunting* v. *Ricks*, 2 D. & B. Eq., 130. *Smith* v. *Fortescue*, Busb. Eq., 127.

II. Whitted's position may be assimilated to that of a creditor secured by a deed in trust—in the first class; Strudwick the *second;* Miss Nash the *third.*

He has a right to pursue the property and is not affected by the equities which may exist between 2nd and 3rd class creditors, and this right cannot be divested by a sale to creditors of the 2nd class; they are not entitled to such assets, if their debtor was; they cannot take the assets not belonging to their debtor.

[Mr. Graham, in an able and extended argument, exhausts the subject. The above is a mere condensation of the main points.]

Phillips & Merrimon, for the appellee.

PEARSON, C. J. If a *simple contract* creditor receives payment of the executor a *bond* creditor cannot afterwards, either at law or in equity, compel the contract creditor to refund; for, although the bond debt is of higher dignity in the administration of *legal* assets, both are creditors; and the creditor who is first paid may in good conscience retain the money, and leave the bond creditor to his remedy against the executors for a *devastavit.*

It is equally clear that, if the simple contract creditor accepts, of the executor, property of the estate of the testator,
in satisfaction of the debt, it falls within the same
(593) principle, provided the property is taken at a full

price, *bona fide*, and without notice that the executor is contriving to defeat the priority of the bond creditor.

In our case, the property was accepted in satisfaction of the debt, at full price, *bona fide* and without notice, so it comes within the principle above stated.

In regard to the rent, or more properly the charge for use and occupation, the fact is not distinctly stated; but we take it, there was no agreement about it. Miss Nash continued to occupy the residence after the death of her mother, with a "general understanding," as it is called in the case, that the use and occupation was to go against the interest accruing upon her debt, and that this matter was included in the arrangement in reference to the purchase of the residence, and of the "coal-field land" mentioned in the pleadings.

If the transaction had stopped here, there could be no objection to the ruling in the Court below. But, unfortunately for Miss Nash, it did not stop here, for, as a part of the same transaction, she bought of the executor the "coal-field land," at the price of $4,015. This purchase-money has not been paid. The record sets out, that for the purchase-money she executed her bonds to certain persons, who were creditors of the executor. (We will remark, that the omission to set out the names of the persons to whom Miss Nash executed her bonds, is a want of certainty inexcusable in judicial proceedings.) Had she paid the purchase-money, all would have been well.

This Court has never adopted the doctrines of the Courts in England, by which "a purchaser from a trustee is bound to see to the application of the purchase-money." But here the purchase-money has not been paid, and the Court will arrest it and see to its application.

There is a fund in the hands of Miss Nash which, in conscience, ought to be applied to the payment of the debts of the testator, and the Court will not permit it to be (594) directed and paid to the creditors of the executor, which is the direction attempted to be given in the original transaction. True, the testator was indebted to the executor; but it was a simple contract debt, and he cannot pay himself and commit a *devastavit*, to the prejudice of a specialty creditor who has priority.

It was suggested at the bar that a large part of the debt, for which Miss Nash substituted her notes, was, in fact, a specialty debt of the testator; should this be so, the doctrine

of subrogation will apply, and in regard to that, the executor will not have been guilty of a *devastavit;* but as to the other part, the right of the plaintiff, who is a specialty creditor, to have the fund arrested before it is paid over, and have it applied to his debt, is clear.

This right, the plaintiff cannot set up by the proceeding in its present shape: to say nothing else, the '*certain persons*" who hold the bonds of Miss Nash, are necessary parties, and there can be no adjustment of the equities until they are before the Court, so as to be bound by the final decree. For this defect the judgment in the Court below, dismissing the action, will be affirmed, unless Miss Nash may consent to an order remanding the case, to the end that proper parties be made, and the complaint be amended so as to strike at the purchase-money of the coal-field land.

In this connection, there is another view of the subject, which we feel at liberty to present. Miss Nash says, she was induced to become the purchaser of the coal field land because of her solicitude to be the owner of her father's residence—her home. She entered the transaction believing, from what Dr. Strudwick told her, that his debt and her debt, were all the debts of her father remaining unpaid, and upon this representation she agreed to pay, what turns out to be, an exorbitant price for the coal-field land; but now she finds another large debt which has to be paid, so that the cherished wish of her heart, to pay all the debts of her father, cannot be accomplished without assuming a greater
(595) burthen than she supposed she was undertaking at the time of the contract of the purchase.

We are inclined to the opinion that these facts create an equity for recission of the whole contract, so as to remit the parties to their original rights, to the end that she may, if so advised, consent to the order remanding the case. Our judgment affirming the judgment below will not be entered, until she certifies her election, which must be before the end of the present term. Otherwise the complaint will be dismissed *without prejudice* to further proceeding, as the plaintiff may be advised.

PER CURIAM. Ordered accordingly.

(596) JOHN HORTON *v.* ELIJAH GREEN.

1. In action for deceit and false warranty, after evidence by plaintiff that he discovered the alleged unsoundness (glanders) early next morning after the sale, it is competent by way of impeaching such testimony, for the defendant to prove by a witness that he and plaintiff lived in a very small village (Boone), and within fifty yards of each other, and that he (witness) did not hear of the alleged unsoundness until some *two weeks* after the sale.

2. Per BOYDEN, J., *arguendo:* Glanders among stock is quite as alarming to the owner as small pox among men.

3. Evidence, by way of dialogue, *in haec verba:*
Plaintiff.—"What will you take for your mule?"
Defendant.—"One hundred and twenty-five dollars."
Plaintiff.—"I can't give $125, but if it is all sound and right, I will give you $100.
Defendant.—"It is all sound and right, and I will take $100, if you you will pay the money down."
Plaintiff.—"I cannot pay the money all down, but will pay $25 down, and give my note and security for the balance."
Defendant.—"I agree; here's your mule."
Does not *per se* constitute a warranty, but is only evidence for the jury, to be weighed by them in connection with the surrounding circumstances of the transaction.

4. Among these circumstances may be considered the tone, looks, gestures and the whole manner of the transaction.

5. The doctrine upon special contracts of personalty and the point, whether the question of warranty is to be decided by the Court or left to the jury with the proper instructions, has been too long and too thoroughly settled in this State, to be now overturned by decisions in other Courts, and this Court is satisfied with the reasoning and adheres to the former decisions.

The cases of *Baum* v. *Stevens*, 2 Ired., 411; *Erwin* v. *Maxwell*, 3 Mur., 241, and *Ayers* v. *Parks*, 3 Haws, 59, cited and approved.

Civil action, tried before Mitchell, J., at the last Fall Term of Caldwell Superior Court.

It is considered that the *syllabus* and opinion con-
(597) vey a sufficiently correct idea of the questions raised and points decided, without an attempt to condense the voluminous statement contained in the transcript. Suffice it to state, that the second point was made by way of requests for instructions to the jury, embracing substantially the language contained in the dialogue in the third *syllabus.* *

*The Attorney General would respectfully suggest to the Profession, that reporting would be greatly expedited, where the statement of the case is voluminous, if counsel engaged would file a brief of "the points" intended to be raised on the record, and he knows none to whom this analytical process would be less irksome than the learned counsel who appeared in this cause.

There was a verdict and judgment for the defendant, and the plaintiff appealed.

Folk and *Batchelor*, for the appellant.

It is often said in the books, that "whether a verbal warranty as to the quality of a personal chattel exists or not, is a question of intention, to be inferred by a jury from the nature of the sale and the circumstances of the particular case."

If this means that the rules for interpeting verbal warranties differ from those applied to other contracts—the position is not sustained by legal analogy and authority. It is true that the existence of a warranty, like that of every other contract, depends upon the intention of the parties, but it does not follow that such intention is, in every case, matter of fact to be ascertained by a jury. If the warranty depends upon words and circumstances which are disputed, the jury in determining the dispute, necessarily determines the question of warranty; but if the words, and the circumstances under which they were used, are ascertained, the existence of the warranty is matter of law for the Court.

The learned counsel then proceeded to make many dis-
(598) tinctions, presented numerous analogies, collated and reviewed the cases on the subject from earliest period. The great "length" of his "brief" forbids its insertion.

Battle & Sons, for the appellee.

I. The evidence of the witness, to prove that he lived within fifty yards of plaintiff, and how long after the sale before he heard of the disease, was competent,

(1.) To show that the mule was sound.

(2.) To discredit plaintiff's testimony.

II. A mere affirmation of soundness does not amount to a *warranty*, unless it was so intended, and such intent was a question of fact for the jury, 1 Pars. Con., 580, 581, note w, (5th ed.) *Erwin* v. *Maxwell*, 3 Mur., 241, *Inge* v. *Bond*, 3 Hks., 101, *Baum* v. *Stevens*, 2 Ired., 411, *Foggart* v. *Blackweller*, 4 Ired., 238, *Starnes* v. *Erwin*, 10 Ired., 226.

Armfield, on the same side:

Where the words used are merely words of commendation

used as only expressing an opinion, no action of warranty lies. Selwyn's N. P., 683. *Erwin* v. *Maxwell*, 3 Mur., 241, *Foggart* v *Blackweller*, 4 Ired., 237.

BOYDEN, J. In this case, the plaintiff offered evidence to show that the next morning after the trade, between daylight and sun-up, plaintiff's son discovered that the mule was diseased and running copiouly at the nose, his legs and throat swollen, and his head drooping. The defendant called on Thomas J. Coppy, as witness, who stated that he, at the time of the trade and after, lived in the same town with the plaintiff, (which is quite a small village) and within fifty yards of the plaintiff. This witness was then asked: "How long after the sale, by Green to Horton of this mule, did you first hear that it was diseased. The question was ob-
(599) jected to by the plaintiff, but the Court admitted it, and he answered, about two weeks.

This, we think, was some evidence, at least, tending to contradict the plaintiff, whose statement went to show that the mule, the morning after the purchase, was pretty far gone with the glanders, of which disease the mule and five others of his stock died—a disease among stock quite as alarming to the owners as small-pox among men. The case of *Newby* v. *Jackson*, 7 Jones, 351, is a full authority for the admission of this evidence. The only other question made in this Court was, that the language used by the parties, if believed, constituted a warranty in law; that His Honor ought so to have instructed the jury. The evidence which plaintiff insisted on amounted to a warranty in law, was as follows:

Horton said, "what will you take for your mule?" Green said, "one hundred and twenty-five dollars." Horton said, "I can't give one hundred and twenty-five dollars; but if it is all sound and all right, I'll give one hundred dollars." Green replied, "it is all sound and all right, and I will take one hundred dollars, if you will pay the money down." Horton replied, "that he could not pay the money all down, but offered to pay twenty-five dollars down, and to give his note with security for the balance, to which Green assented."

It was this language, which passed between the plaintiff and defendant, which the plaintiff's counsel contended constituted a warranty in law, and that His Honor should so instruct the jury.

His Honor declined so to instruct the jury, but said to the

jury, "It is for you to say what the meaning and intent was between Horton and Green, from the testimony of Horton and Brown and the other testimony in the cause, and to determine, from the language used, the spirit in which the parties met, and all the other circumstances, whether it was Green's intention to indemnify Horton from all damages that might arise from unsoundness of the mule. We think His Honor was right in refusing the instructions asked, and that
(600) the instructions given were proper.

In the case of *Baum* v. *Stevens*, 2 Ire., 411, the late Chief Justice Ruffin, in speaking of a parol warranty, says: "We think the rule is correctly laid down by Chief Justice Taylor, in the case of *Erwin* v. *Maxwell*, 3 Murphy, 241, that to make an affirmation at the time of sale a warranty, it must appear, upon evidence, to have been so intended, and not to be a mere matter of judgment and opinion. It is certain that a *warrant* is not an indispensable term in contracts respecting personalty, as it is in conveyances of freehold.

It is also true, that a representation simply of soundness, does not import absolutely a stipulation of the existence of that quality; but a representation may be made, in such terms and under such circumstances, as to denote that it was not intended merely as a representation, but that it entered into the bargain itself.

In the case of *Ayers* v. *Parks*, 3 Hawks, 59, Hall, Judge, says: "That whether an affirmation at the time of sale was intended as a warranty, is a matter of fact to be left to the Judge. Of necessity, in verbal contracts;" says Chief Justice Ruffin, "greater latitude must be allowed to evidence to establish the words and meaning of parties. The evidence may consist of everything which tends to establish that the vendor meant to convey the impression that he was binding himself for the soundness of the article, and that the vendee relied on what was passing as a stipulation."

Among these circumstances, even the tones, looks, gestures and the whole manner of the transaction, with all the surroundings, would be competent evidence for the jury to consider in making up their verdict.

The doctrine upon special contracts of personalty, and whether the question of warranty is to be decided by the Court, or left to the jury with proper instructions, has been too long and too thoroughly settled in our State to be now

overturned by decisions in other Courts. We adhere (601) to the decision of our own Court upon these questions.

This case was argued with much ability, and many authorities cited by plaintiff's counsel, and we admit that they cannot all be easily reconciled; but they fail to satisfy the Court that our decisions are all erroneous, or that His Honor erred in his instruction to the jury upon the question of warranty.

There is no error.

PER CURIAM. Judgment affirmed.

RUSSELL H. KINGSBURY *v.* WILLIAM R. SUIT *et al.*

1. A single bill given for money borrowed to pay a debt theretofore contracted, by reason of the loan of money to hire a substitute for the Confederate war service, is not tainted with an illegal consideration.
2. The act of the obligor in having previously borrowed money to pay such substitute, though contrary to public policy, had been completed before he borrowed the money from the plaintiff; therefore, the single bill given for the money last borrowed, is a new and independent contract, between different parties, in no way including the illegal transaction, and its subsequent connection with the matter is too remote to affect the obligee.

The cases of *Calvert* v. *Williams*, 64 N. C., 168; *Kingsbury* v. *Gooch*, 64 N. C., 528, and *Critcher* v. *Holloway*, 64 N. C., 526, cited and approved.

This was an action of debt upon a single bill, commenced under the old system, and tried at Spring Term, 1871, of Granville Superior Court, before His Honor, Judge Watts, and a jury.

There was evidence tending to show that, in 1862, William R. Suit, the principal obligor, hired a substitute to go into the Confederate army, and for that purpose borrowed the money necessary from one Reams; and that afterwards (602) he borrowed the money for which the single bill sued on was given to pay off Reams, and so informed the plaintiff.

His Honor charged, that if the jury were satisfied that the plaintiff was informed, at the time of lending the money, that the defendant intended to use it in hiring a substitute to put a soldier in the Confederate army, the plaintiff could not recover.

His Honor was requested to instruct the jury, that if they believed, from evidence, that the defendant borrowed the

money, not to hire a substitute, but to repay Reams' money, previously borrowed of him, who had loaned the money to put in a substitute, and plaintiff loaned with that knowledge, that then the contract was lawful and the plaintiff was entitled to recover. His Honor refused this prayer, and instructed the jury that it made no difference, if Reams had lent the money to the defendant to hire a substitute, and afterwards money was borrowed by the defendant of the plaintiff to repay Reams, and the plaintiff knew its use was to hire a substitute.

Under these instructions a verdict was found for the defendants, and from the judgment rendered thereon the plaintiff appealed.

Hays, for the plaintiff.
Phillips & Merrimon, for the defendant.

DICK, J. The defendant alleges that the note upon which this action is founded, was given for money borrowed for the purpose of putting a substitute in the Confederate army, and that the illegal purpose was known to the plaintiff when the contract was executed.

The defendant states that he had previously borrowed money from Reams to pay a substitute, and had put one in the army, and the money obtained from the plaintiff was used in discharging the Reams debt. The act of the
(603) defendant, which was contrary to public policy, had been completed before he borrowed money from the plaintiff.

The note sued on is, therefore, a new and independent contract between different parties, and in no way including the illegal transaction, and its subsequent connection with the matter is too remote to affect the plaintiff.

The note to Reams may have been void, but lending money, which the borrower used in paying off a void bond previously executed, is not illegal. *Calvert* v. *Williams*, 64 N. C., 168.

It does not appear however that the note to Reams was void, as he may have loaned the money to the defendant without any knowledge of the illegal purpose to which it was to be applied.

In *Kingsbury* v. *Gooch*, and *Critcher* v. *Holloway*, 64 N. C., 526 and 528, the money loaned was the proximate and moving

cause of the illegal transactions, and in those cases we carried the doctrine of illegality of consideration to its proper extent.

There was error in the ruling of His Honor, and there must be a *venire de novo.* Let this be certified.

PER CURIAM. Judgment reversed.

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(604) H. W. BURTON *v.* ADMIRAL CHARLES WILKES.

1. The stipulations contained in a contract in these words, viz.: "A B contracts with C D to furnish, at Long Creek Furnace, from 500 to 1,000 bushels of coal daily, at 6½ cents per bushel, to be measured at the pit; C D to furnish the timber gratis wherever he may see fit, reserving groves and fruit trees, and advance to A B all the money, weekly, necessary to pay off the wood-choppers—coal to be paid for on delivery at the furnace," are dependent, and if, without fault on the part of the owner of the furnace, and without legal excuse, the other fails to deliver the quantity of coal agreed to be delivered, the owner of the furnace being sued for the value of coal, &c., furnished, may properly set up such failure by way of counter-claim.
2. In an action based upon such a contract, where it appeared that there had been a failure to deliver 500 bushels of coal on any one day, and that the defendant had failed to make as much iron, in consequence of such failure, as he otherwise would have done, a charge, which does not allude to the counter-claim, based upon the foregoing facts, until attention is called to the omission, and which then merely states, "that if the plaintiff failed to perform his contract, he could not recover, and that if defendant failed he could not recover, is erroneous, and especially in this case, where there seems to be no controversy as to the plaintiff's claim, and the main point of the controversy is as to the defendant's counter-claim.
3. A charge, which misses the point of the case and fails to enlighten the jury on the main points in controversy, cannot be sustained.
4. A Judge has not a right to hand to the jury a slip of paper containing an abbreviated estimate of plaintiff's claim for damages, against the wish of the opposite party.

The cases of *Watson* v. *Davis*, 7 Jones, 178, and *Outlaw* v. *Hurdle and others*, 1 Jones, 150, cited and approved.

This was a civil action tried at Fall Term, 1871, of Lincoln Superior Court, before His Honor, Judge Lagan, and a jury.

The plaintiff in his complaint alleged, that he had made a contract with the defendant, who was running an iron furnace, in writing, in these words, viz.:

"ARTICLES OF AGREEMENT BETWEEN H. W. BURTON
(605) AND ADMIRAL CHARLES WILKES.

"H. W. Burton contracts with Admiral Charles Wilkes to

furnish, at Long Creek Furnace, from 500 to 1,000 bushels of coal, daily, at 6½ cents per bushel, to be measured at the pit. Admiral Wilkes agrees to furnish the timber gratis, wherever he may see fit, reserving groves and fruit trees, and advance to H. W. Burton, all the money, weekly, necessary to pay off the wood-choppers—coal to be paid for on delivery at the furnace.

"H. W. BURTON,

"Nov. 16th, 1869. "CHARLES WILKES."

And that about the 1st December, 1869, the defendant further agreed, without writing, that plaintiff should take certain wood of defendant's, already cut down, and make coal of it, and that the plaintiff should only receive, for coal made of this wood, five cents per bushel.

That when the written contract above stated was made, the defendant also agreed, by word of mouth, to take off the plaintiff's hands all the wood that might remain on plaintiff's hands when he ceased "coaling."

That, under these several contracts, the plaintiff furnished coal and wood to make coal, as charged in an account exhibited with his complaint.

Defendant, by his answer, admitted the execution of the written contract, but allged that the plaintiff had failed to fulfil his part thereof; that plaintiff had not delivered, daily, 500 bushels of coal on more than three days.

Defendant also admitted the contract of December 1, 1869; but denied the oral contract of November 16, 1869.

Defendant alleged, by way of counter-claim, that plaintiff had agreed to furnish daily at least 500 bushels of coal, and failed to do so, whereby his furnace, which was of
(606) capacity sufficient to consume that amount of coal daily, became "banked up," and stopped, and defendant was thereby prevented from manufacturing as much iron as he would otherwise have done, and demanded by reason thereof, damages to the amount of three thousand dollars.

By way of reply to this counter-claim, the plaintiff alleged the 500 bushels of coal was not furnished daily in consequence of the defendant's failure to pay the wood-choppers, or to pay for the coal on delivery.

The case was submitted to the jury with issues.

There was evidence in behalf of the plaintiff, tending to show that, after the written contract was signed, defendant agreed that if the furnace stopped, he would pay for the wood

left on hand, and that he wanted "coaling" to go on even if the furnace stopped.

It was also in evidence, that the plaintiff stopped "coaling" because he was not advanced money, weekly, to pay the wood-choppers, and that he had not the money to carry on the business; that after the plaintiff quit, he, at the instance of defendant, met the defendant's general business agent, one Alexander, and Alexander "took up" all the wood left on hand, by which is meant, that he received it and marked it with a cross, as was the custom among choppers; that he also "took up" all the coal made and delivered; these being the main items in controversy in this action. It was also in evidence that the plaintiff had not delivered on any one day 500 bushels of coal, or averaged that much per day, and that his reason for failing to do so was that he could not employ enough choppers, for want of means. It was also in evidence, that it would require about three months in the country to get ready to make coal, in order to furnish as much as 500 bushels of coal daily; that thirty choppers were necessary, teams to haul, and time to "set" the pits, etc. There was also evidence that after the "coaling" ceased, the defendant admitted the plaintiff's claim, as set up in this action,
(607) and did not set up any defence thereto; but, on the contrary, let a silent partner have pig-iron in satisfaction, which was afterwards given back on an express promise by defendant's general agent to pay the account in full.

It was in evidence, on the part of the defendant, that his furnace had two "tuyers," and that it required 500 bushels of coal daily to run both tuyers; that if both tuyers could have been run, the furnace would have yielded one and a half more tons of iron per day, and metal was then worth $30 to $40 per ton; that about Christmas, 1869, a cog broke in one of the blast-wheels; that it took ten days to repair it, and in the meantime the furnace was "banked up," to prevent combustion of material and chilling of the furnace; that, after the blast-wheel was repaired, there was only 500 bushels of coal on hand, and furnace did not start for eight days. The plaintiff's counsel insisted that the plaintiff was entitled to a reasonable time to begin delivering 500 bushels of coal daily, and that the plaintiff was prevented from doing so by the failure of the defendant to advance money to pay wood-choppers before such reasonable time elapsed; and that, in the meantime, if plaintiff furnished coal and defendant accepted

and used it, as it was stated on the account, the plaintiff was entitled to recover the value of it; and that the defendant could not recover on his counter-claim, because of his failure to pay wood-choppers, and because he did not aver readiness and ability, &c. Defendant's counsel insisted that the plaintiff could not recover on the written contract, because he had not complied with its provisions; that unless he had delivered 500 bushels daily he could not recover under the written contract; that, as to the oral contract about the wood, there was a variance between the allegations and the proof; and as to the counter-claim, that if the plaintiff's failure to deliver the 500 bushels of coal daily, injured plaintiff as stated, he was entitled to recover to the amount of damages thus sustained.

His Honor charged the jury, "that if the plaintiff's
(608) contract was not complied with, he could not recover on it, but that the law did not require impossibilities, and the plaintiff was entitled to reasonable time to prepare for executing it; that if the plaintiff was prevented, by the defendant's failure on his part, from furnishing the coal as provided for in the contract, he was nevertheless entitled to the value of the articles furnished and received by the defendant; that if, after the work ceased, any agreement was made for the payment between the parties, the plaintiff was entitled to recover accordingly." His Honor then handed to the jury a slip of paper in these words:

Plaintiff claims balance	$ 57.77
Wood and coal	560.39
Interest (left with jury)	64.90
Claim and interest	683.06

To this the defendant excepted. Defendant's counsel then called the attention of His Honor to the circumstance that he had failed to charge upon the counter-claims, whereupon His Honor instructed the jury, that "if the plaintiff failed to perform his contract, he could not recover; and if the defendant failed, he could not recover."

Under these instructions, the jury found a verdict for the plaintiff, assessing his damages at $683.06, and from the judgment rendered thereon, the defendant appealed.

Schenck and *Bailey*, for the plaintiff—

Moved to dismiss the appeal, because it did not appear that the undertaking of appeal had been filed in ten days. The Court it seems began 23d day of October, 1871, and the appeal bond is dated —— day of November, 1871, also because there was no justification. Another undertaking of appeal was filed December 1st, 1871, which only appears to
(609) be justified as to one of the sureties. This motion being denied, they filed a brief, which has been mislaid.

J. H. Wilson, for the defendant.

BOYDEN, J. In this case the defendant was the owner of a furnace, in the County of Gaston, which required five hundred bushels of coal daily to run it to its full capacity, and the plaintiff agreed to deliver to the defendant, daily, at his furnace, from 500 to 1,000 bushels of coal. The plaintiff was to cut the wood on the defendant's land, burn the coal and deliver it, and the defendant was to furnish, weekly, money to pay the wood-choppers, and to pay for the coal as it was delivered at the furnace. This contract was made, in writing, on the 16th day of November, 1869. There was no time fixed in this contract when the plaintiff should commence cutting wood or delivering the coal. There was a quantity of wood cut at the time the contract was made, how much does not appear, which the plaintiff was to use in making coal; but the coal made of this wood was to be delivered at a less price than that fixed in the contract. It does not appear that there was any complaint that the plaintiff did not commence cutting wood and delivering coal in reasonable time; but it does appear, in the testimony of the plaintiff himself, that on no one day did he deliver the minimum quantity of coal he had contracted to deliver, and there is evidence tending to show that, for lack of the proper quantity of coal, the defendant could use but one of his tuyers; and that by using but one, he could not make as much metal, by a ton and a half per day, as he could have made had the plaintiff furnished the minium quantity of coal agreed to be delivered daily; and that the metal at the time was worth from thirty to forty dollars per ton.

When the defendant failed to furnish the money weekly to

pay the wood-choppers, or to pay for the coal as deliv-
(610) ered, does not appear; nor does it appear when the plaintiff complained, if ever, before he ceased coaling, that the money was not advanced to pay the wood-choppers and for the coal as delivered.

There is no allegation in the complaint, that the plaintiff ceased his coaling operations, because the defendant failed to furnish, weekly, the money to pay the wood-choppers and for the coal as delivered; nor is there any complaint, on the part of the defendant, that the plaintiff stopped coaling when he did. The commencement of the plaintiff's operations, and their stoppage, seems to have been by mutual consent of the parties.

But there is an allegation in plaintiff's replication to defendant's counter-claim, that defendant is entitled to no damages, for the reason that the non-delivery of the minimum quantity of coal daily was caused by the defendant's failure to advance, weekly, money to pay the wood-choppers; but, even in this reply, there is no allegation that the coal was not paid for as delivered.

The defendant, in his counter-claim, demands large damages for the non-delivery, daily, of the minimum quantity of coal. There was evidence tending to show that defendant had sustained damage by this failure on the part of the plaintiff.

The stipulations in the contract, we think, are dependant stipulations, and the counter-claim is the proper subject of a cross-action in this case.

His Honor charged the jury as follows, and this is his entire charge on this complicated case: "That if the plaintiff's contract was not complied with, he could not recover on it; but that the law did not require impossibilities, and that plaintiff was entitled to reasonable time to prepare for executing it; that if plaintiff was prevented, by defendant's failure on his part from furnishing the coal as provided in the contract, he was nevertheless entitled to the value of the articles delivered, and received by the defendant; that, if after the work ceased, any agreement was made for payment, between the parties, then the plaintiff was entitled to recover
(611) accordingly." This was said without any reference to the counter-claim of defendant. In this, we think, there was error.

His Honor then handed to the jury a slip of paper, in these words:

Plaintiff claims balance	$ 55.77
Wood and coal	560.39
Interest (left with the jury)	64.90
Claim and interest	$683.06

Defendant's counsel objected to this paper being handed to the jury.

The defendant's counsel then called the attention of the Court to the fact that he had not charged as to the counter claim. In reply to this suggestion, His Honor told the jury: "That if the plaintiff failed to perform his contract, he could not recover, and if defendant failed, he could not recover," and, without further remarks, the jury retired, and in their verdict for the plaintiff, found the exact amount stated in the slip of paper handed to them.

His Honor, in his charge to the jury, gave them no instructions as to the main points in controversy, to-wit: whether the defendant was entitled to have his counter claim considered by the jury, and if so, what damages was he entitled to, or was he entitled to any damages in his counter claim, because, as alleged in plaintiff's replication, his failure was caused by the neglect of the defendant to advance, weekly, the money to pay the wood choppers. These seem to be the principal points in controversy, there being no allegation that the plaintiff did not commence in reasonable time, or that he did not cease operations by the consent of the defendant.

We think His Honor's charge, in regard to reasonable time, was well calculated to mislead the jury, when he in-
(612) formed them that the law did not require impossibilities, and that he was entitled to reasonable time to commence the execution of his contract, as it was as much as to say to the jury, that if plaintiff had contracted to deliver, daily, from five hundred to one thousand bushels of coal, he would be excused from the delivery, upon the ground that it was impossible for him to do so.

We think His Honor was also in error in delivering exhibit E. to the jury. *Watson* v. *Davis*, 7 Jones, 178, and *Outlaw* v. *Hurdle and others*, 1 Jones, 150.

There is error. Let this be certified.

PER CURIAM. *Venire de novo.*

STATE *v.* JACOB HANKS *et al.*

1. The object of the Act of 1865–'66, entitled "An act to prevent wilful trespass an lands," &c., was to keep off intruders, and to subject them to indictment if they invaded the possession after they had been forbidden.

2. A forcible trespass "is a highhanded invasion of the actual possession of another, he being present; the title is not drawn in question." Where, therefore, a person who had made an entry, believing a tract of land to be vacant, and had procured a warrant of survey, and under said warrant of survey, had entered upon the land in the possession of another; *Held*, that although the land was not vacant, yet that such person could only be guilty of a civil trespass and not a forcible one, as above defined.

State v. *McAnless*, 9 Ired., 375.

This was an indictment for a forcible entry, tried before Mitchell, Judge, at Fall Term, 1871, of Wilkes Superior Court.

The case was, that the defendant, Hanks, had made an entry and procured a warrant to survey the land upon which the alleged trespass was committed. The warrant was (613) placed in the hands of the county surveyor who summoned and swore the defendant, Durham, and another, as chain carriers.

The surveyor and the two defendants and the other chain-carrier proceeded to survey the land, and the trespass was in making the survey under the circumstances hereafter stated.

The prosecutor claimed the land embraced in the defendant's survey; alleged that he had been in possession for more than fifty years, under known and visible boundaries; he showed a grant, issued in 1803, and a deed for fifty acres, which covered a portion of the tract surveyed; the defendants and the surveyor passed through a field claimed by the prosecutor, and which had been cleared, fenced and occupied, for two years or more, by a son of the prosecutor; the prosecutor knowing the intention of the defendant, Hanks, to enter and survey this land, objected to his doing so; when the survey was made the son of the prosecutor was present and, for his father, forbade, the surveyor and defendants from entering upon his land; they did enter and run a line through it.

The defendants insisted that they were not guilty, upon this state of facts, and that the indictment could not be sustained under the act of 1865–'66, chap. 65.

His Honor charged the jury that, if they believed the testimony, the defendants were guilty.

Attorney-General Shipp and *W. P. Caldwell*, for the State.
No Counsel, for defendant.

BOYDEN, J. His Honor was mistaken in supposing that the act of 1865–'66 was intended to cover such a case as this. The act is entitled "an act to prevent wilful trespasses on lands, and stealing any kind of property therefrom," it was manifestly its object to keep off interlopers, and to subject them to indictment, if they invaded the possession, after they had been forbidden.

(614) The defendants in this case supposed that they were engaged in the performance of a duty, imposed upon them by law; they had no purpose or intent of doing any wrong to the prosecutor.

The defendant, Hanks, having made an entry and having procured a warrant of survey, and having employed the county surveyor, who had summoned and sworn the defendant, Durham, as a chain-carrier, were all in the act of making a survey of the entry when they passed through a small piece of inclosed ground, which had been cleared and cultivated by the son of the prosecutor, who was present, and by the directions of his father, forbid the entry, and the case states they had before been forbidden; but that could make no difference.

In the case of the *State* v. *McAnless*, 9 Ired., 375, the present Chief Justice says the "gist of the offence of forcible trespass is a high-handed invasion of the actual possession of another, *he being present;* the title is not drawn in question."

With what propriety could the action of the defendants be denominated a high-handed invasion of the actual possession of the prosecutor? It would seem to be a complete perversion of language thus to designate the conduct ef the defendants.

Doubtless the defendants honestly believed that the warrant of survey gave them a license to enter the land of the prosecutor, if it became necessary to do so, in surveying the entry. It may be that in this they were mistaken, and that, if the field through which they passed was not vacant land, but really was the land of the prosecutor, the defendants subjected themselves to a civil action, but not to an indictment for a forcible trespass.

There is error. This will be certified.

PER CURIAM. Error.

(615) STATE *v.* MARTHA QUEEN.

Where a State's warrant was issued against several persons, one of whom was not arrested, but went before a Justice of the Peace and entered into a recognizance to appear at a future time, and failed to appear, and the Justice afterwards re-issued said warrant, without any special command endorsed thereon: *Held*, that the person who had entered into the recognizance could not be arrested on said warrant. That the warrant was "*functus officio*," and that the officer acting under it was a trespasser.

The case of *State* v. *Brittain*, 3 Ired., 17; *Murrell* v. *Roberts*, 11 Ired., 424, cited and approved.

This was an indictment for assault and battery, tried before Mitchell, Judge, at Fall Term of Wilkes Superior Court.

The facts of this case are fully stated in the opinion of the Court.

Under instructions from the Court, there was a verdict of guilty. Judgment by the Court, and appeal by the defendant.

Attorney General, for the State.
Furches, for the defendant.

BOYDEN, J. In this case a warrant had issued, on the 27th day of October, 1870, by W. A. Foster, an acting Justice of the Peace, against the defendant, and her two sons and daughter, and one Tedder, the children being minors, charging them with larceny of a cow, the property of one Trensaw.

The warrant was executed on the two sons and Tedder, by a constable, Anderson, but not on the defendant, Martha, on account of alleged sickness. On the next day (Nov. 1, 1870,) the warrant was returned, and, at the instance of the defendants, was postponed until the 8th day of November, and the defendants, who had been arrested, were put under a recognizance for appearance on that day, when the

(616) defendant Tedder appeared, and, the State not being ready for trial, the case was again postponed until the first Saturday in December, and all the defendants were put under a parol recognizance for their appearance on that day.

On the day appointed, Martha Queen and her daughter, and Joel H. Tedder failed to appear; but David and Sidney Queen appeared, and were bound over to Court, and on the 20th day of December the Justice, on the book of the warrants, made the following entry:

NORTH CAROLINA—WILKES COUNTY.

To any lawful officer, GREETING:

You are hereby commanded, as before, to take the body of Joel H. Tedder, the defendant named in the written warrant, and bring him before me, at my office in Wilkesboro, *instanter*, to answer the charge of the State upon information of larceny, this 20th day of December, 1870.

WM. A. FOSTER, J. P.

About the first of April, 1871, the Justice of the Peace placed this same warrant in the hands of the constable, Anderson, without any endorsement thereon to show that the defendant Martha, before that time, had been put under a parol recognizance and permitted to depart; but that such had been done, was well known to the constable.

On the 10th of April, the constable, Anderson, together with the prosecutor, Parker, and two other persons, in the night, went to the house of the defendant Martha, she being in bed, and called upon her son to get up and strike a light and let them in, which he refused to do.

The prosecutor then, after being refused admittance, attempted to force open the door, and the assault and battery, charged in the indictment, was made upon the prosecutor, while he was attempting to force his way into the (617) house of the defendant; so that the case turns upon the validity of the warrant. If the warrant was still in force, the defendant was guilty; then she had no right to resist his entry into the house. The State insists that, inasmuch as the warrant has no certain day for its return, it is still in force.

To this it was replied that the warrant has a certain and definite object, to-wit, to bring the parties therein charged before the Justice, that he may deal with them according to law; and that when the parties charged in the warrant had appeared before the Justice, and he had taken their recognizance, and permitted the defendants to depart, the warrant had spent its force and was *functus officio*, and it would seem the Justice so considered it, and that when he re-delivered it to the constable, it was only for the purpose of arresting the defendant Tedder, as he had renewed the warrant as to him by commanding the constable to rearrest him, and to bring him forthwith before the Justice; and it would seem that this

was the proper course, but upon that we give no opinion further than to say, that the Justice could not authorize the arrest of the defendant by handing the warrant to the constable, without some command entered thereon for the arrest of the defendant.

In the case of the *State* v. *Brittain*, 3 Ire., 17, it is said that after once taking bail, the Sheriff, on finding the bail to be insufficient, has no right to rearrest the defendant, and that the defendant in such a case was justified in resisting the arrest.

And it has also been held "that if a Sheriff have a *ca sa*, and after payment by the debtor, within his knowledge, he (the Sheriff) arrest him, it is undoubtedly false imprisonment. Den. on demise of *Murrell* v. *Roberts*, 11 Ire., 424, and it is there said by Chief Justice Ruffin, that it is illegal to act on a *fi. fa.*, after satisfaction to the Sheriff, and he is a trespasser, if he seize goods afterwards. And in *Hammett* v. *Wyman*, 2 Mass. Rep., it was said that the execution
(618) thereby became *functus officio*, and the sale under it was void, and conveyed no title to the purchaser.

So in our case, we think the warrant was *functus officio*, and that Parker and the others were trespassers, and that the defendant had a right to resist their entry into her dwelling.

There is error.

PER CURIAM. *Venire de novo.*

STATE *v.* MARY A. TURNER.

1. The turkey is a domestic animal, therefore, when a bill of indictment charges that A. B., "one turkey of value of six pence, of the goods and chattels of C. D., feloniously did steal, take, and carry away;" *Held*, that such indictment is sufficient in law.
2. Distinction between stealing domestic animals and animals *ferœ naturœ*, stated by BOYDEN, JUDGE.

This was an indictment, tried before Clarke, Judge, at Fall Term of Wayne Superior Court.

The indictment charged that the defendant, "one turkey of the value of five cents, of the goods and chattels of William Ganis, feloniously did steal, &c." Upon the testimony in the case, the defendant was convicted. A motion in ar-

rest of judgment was made by the defendant and sustained by His Honor, upon the ground "that the indictment was insufficient, for that it failed to state that the turkey stolen was a *tame* turkey; that the turkey was a native fowl of America, large numbers are found in every part of the State, wild and unreclaimed, and that the indictment should have negatived the presumption, that the turkey in question was wild and unreclaimed."

From the ruling of His Honor, the State appealed (619) to the Supreme Court.

Attorney General, for the State.
No counsel for the defendant.

BOYDEN, J. His Honor was mistaken in this case, in supposing that our domestic turkey is a creature *feræ naturæ*. All the authorities cited by His Honor, are cases of creatures *feræ naturæ*, and we take the case to be clear, that where a creature (for the stealing of which) a defendant is indicted is *feræ naturæ*, it will not be sufficient to allege, that the property was of the goods and chattels of one A. B., the owner; in such case, the indictment must further allege, that the creature was dead, tamed, confined or reclaimed, Russell on Crimes, vol. 2, p. 152. But surely this cannot be the case, when the defendant is indicted for stealing one of our domesticated trurkeys.

In Bishop's Criminal Law, vol. 2, secs. 787–788, speaking of animals, *feræ naturæ*, and of which larceny may be committed, when reclaimed, says, "domestic animals and fowls, such as horses, oxen, sheep, hens, peafowls, turkeys and the like, which being tame in their nature, are the subject of larceny on precisely the same grounds as other personal property. As to what is a reclaiming of a wild animal: killing him and getting possession of his carcass is so; that such carcass is fit for food, is a subject of larceny." There is error. This will be certified, so that the Court may proceed to judgment.

PER CURIAM. Error.

(620) STATE *v.* W. A. SMITH.

1. When a defendant in an indictment entered into a recognizance for his appearance at a term of the Superior Court, and he appeared at said term and the cause was continued, but he was required to enter into bond for his appearance at the succeeding term, which he failed to do, and departed without leave of the Court: *Held*, that he might be called out on a subsequent day of the term and the failure noted upon the record.
2. In such cases it is not regular to enter a judgment *nisi*. "A recognizance is a debt of record, and the object of a *scire facias* is to notify the cognizor to show cause wherefore the cognizee should not have the execution of the sum thereby acknowledged. No judgment of forfeiture is required before issuing a *scire facias*.

This was a motion for judgment upon a *scire facias* issued upon judgment *nisi* on a recognizance.

The defendant in the indictment had entered into bond, with W. A. Smith as surety, for his appearance at Fall Term, 1870, of Johnston Superior Court. He appeared at said term and procured a continuance of his case; he was required to give bond for an appearance at the subsequent term. This bond he failed to give, and departed without leave of the Court. On a subsequent day of the term he was called and failed to appear and judgment *nisi* was entered against him and his surety.

The defendant, Smith, insisted that one bound by a recognizance could not be called and a forfeiture entered after the continuance of a cause, and moved to dimiss the *scire facias* which had been served on him.

His Honor being of opinion with the defendant Smith, dismissed the *scire facias*, from which judgment of dismissal the State appealed.

Attorney General, for the State.

BOYDEN, J. His Honor was mistaken, in holding
(621) that a defendant could not be called out after the cause had been continued. The defendant was only allowed to depart upon entering into a recognizance of $500, but he departed without having entered into the recognizance as required. His recognizance required him not to depart without leave of the Court. It is the universal practice near the close of the Court to look over the docket, and call such defendants as have departed without the leave of the Court.

But in such case, it is not regular to enter a judgment *nisi*.

"A recognizance, duly entered into is a debt of record, and the object of a *scire facias* is to notify the cognizor to show cause, if any he have, wherefore the cognizee should not have execution of the same thereby acknowledged. No judgment of forfeiture is required before issuing the *scire facias.*"

The recorded default makes it absolute, subject only to such matters of legal evidence as may be shown by plea, or to such matters of relief as may induce the Court to remit or mitigate the forfeiture." Opinion of Judge Gaston in the case of *State* v. *Mills*, 2 Dev. & Battle, 552.

The proceedings in this case are very irregular and informal, but the only objection on the part of the defendant was, that the default occurred after the continuance of the cause. And His Honor, being of opinion, that when a case was continued, the defendant being in court, the security was thereby released.

In this there was error. This will be certified.

PER CURIAM. Error.

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622) STATE *v.* ALFRED SIMMONS.

1. Two persons may be charged in the same bill of indictment with retailing contrary to the Statute, and one of them may be convicted, and the other one acquitted.
2. When one contracts to sell a gallon of spirituous liquor, and a portion, viz: less than a quart, is delivered at the time of the contract of sale, and afterwards the money is paid and three quarts delivered, and *subsequently* the remainder of the gallon; *Held*, that this is not a violation of the Statute, unless it was artifice to evade the law, and such intent was a question of fact which ought to have been submitted to the jury.

This was an indictment for retaining contrary to the Statute, tried before Mitchell, Judge, at Fall Term, 1871, of Caldwell Superior Court.

The indictment charged a sale by both of the defendants. There was no evidence against the defendant, Bradley, and a verdict was returned in his favor. The testimony against Simmons, the other defendant, was, that he had a quantity of spirituous liquors in a wagon near the town of Lenoir.

A witness stated that he went to this wagon, and defendant had brandy in a barrel. Witness agreed with him for a gallon; defendant then delivered to him a pint. No money was

paid at that time and the gallon was not measured and *set apart.* He further testified, that on the day after he received the pint. he went again to the wagon of the defendant, and paid for the gallon. The defendant at that time delivered to him three quarts, and afterwards, on the same day, another pint, so as to make up the gallon. Defendant Simmons had been indicted, at a previous term of the Court, for selling the pint first spoken of, and had submitted.

Defendant's counsel insisted that as the indictment charged a pint sale, and there was no proof against Bradley,
(623) that there was a fatal variance, and that the facts proved by the State's witness did not make out a violation of the Statute.

His Honor charged that one of the defendants might be convicted and the other acquitted, and that if the jury believed the witness, Simmons was guilty.

Verdict of guilty. Judgment and appeal.

Attorney General and *W. P. Caldwell*, for State.
Folk, for defendant.

BOYDEN, J. This was an indictment for selling liquor contrary to the Statute, and it was alleged that Simmons and Bradley were both guilty, as the indictment charged a sale by Simmons and Bradley; but it turned out in the evidence that the sale of spirits was by Simmons alone; and it is contended that, as Simmons alone sold the spirits, even he could not be convicted, and as two were charged with selling spirits, and but one convicted, it constituted a fatal variance. We are not aware of any authority for such a position, and the authorities cited for the defendant do not sustain the position.

It appears from the evidence that the defendant Simmons contracted for a gallon, and at the time delivered but a pint, and received no money for this first pint delivered; defendant submitted and was fined. That on the next day he paid for the gallon, received three quarts, and on the following day received the remainder of the purchase. And His Honor, upon this evidence, instructed the jury that if they believed the evidence, defendant was guilty. In this there was error. Had His Honor directed the jury to enquire whether this was artifice to evade the Statute, and they had so found, we

could not disturb the verdict, however improper it might have been upon the proof offered.

We think, upon the proof, it was a purchase of a (624) gallon, and His Honor charged the jury that unless the receiving this pint was an artifice to evade the Statute, the defendant was not guilty.

There was error. Let this be certified.

PER CURIAM. *Venire de novo.*

STATE *v.* LAFAYETTE PARKER.

1. When a Judge, in charging a jury, uses this language, to-wit: "If her character, (referring to a witness,) is of ordinary respectability, you will take her testimony to be true, unless she is fully and thoroughly contradicted," it is erroneous. It is the province of a jury to pass upon the credibility of a witness, and the weight of testimony, and although the witness may be *never so reputable*, yet, where there is a conflict of testimony, the Court cannot tell a jury that they must take the testimony to be true. Such a charge is in violation of the Act of 1796.
2. Nor is this error corrected. Where the Judge in a subsequent part of the charge uses language, in referring to the same witness, susceptible of two constructions.

This was an indictment for arson, tried before Mitchell, Judge, at Fall Term 1871, of Wilkes Superior Court.

The principal witness for the State, was Amelia Adams, daughter of the prosecutor, who testified that she heard the defendant threaten, at Mrs. Parker's, to burn her father's barn and other property, and to kill him; and defendants persuaded her to leave her father's house, and if she ever told it, they would kill her. In consequence of these threats, she left on Thursday before the barn was burnt, which was on Friday night. The State offered to prove that the father of the witness sent a messenger for his daughter, who was in Caldwell county, and to relate a conversation between wit-
ness and the messenger on their return. This was ob-
(625) jected to, but admitted by the Court as confirmatory of the statement of witness as to threats, &c., and no further. In reciting the testimony of Amelia Adams, the Judge said to the jury: "It is proper for you to take this view of the case: she fixes the time, place and persons present; if her character is of ordinary respectability, you will take her testimony as true, unless she is fully and thoroughly

contradicted; that the witnesses offered to contradict her, even there at the time they described, and it is for the jury to say whether they had contradicted her or not in her statement," and in referring to her testimony the following language was used: "She testifies before the world, before these men, before you, it is for you to say how far she is to be believed." Other exceptions to testimony were made, and other parts of His Honor's charge were excepted to. It is unnecessary to state these exceptions, as the opinion of the Court is based upon that part of the charge above recited. Verdict of guilty as to one of the defendants. Judgment and appeal.

Attorney General and *Armfield*, for the State.
R. Z. Linney, for defendants.

READE, J. In his charge to the jury, His Honor said of one of the witnesses for the State:

"If her character is of ordinary respectability, you will take her testimony to be true, unless she is fully and thoroughly contradicted," etc.

Although a witness was of more than ordinary respectability, yet the Court could not tell the jury that they must take her testimony as true, if it was in conflict with other witnesses, or with circumstances. Mistake is as fatal to truth as corruption, and the purest may be mistaken. Nor does the qualification, which His Honor made, cure the error. He did not leave it to the jury to *weigh* her testimony with the testimony of other witnesses and circumstances, but they must believe her, unless she was *fully and thoroughly* contradicted. Subsequently, in referring to the testimony (626) of this same witness, His Honor said to the jury, "she testifies before the world, before these men, before you; it is for you to say how far she is to be believed." It is insisted that this cures the original error, because here he leaves the question of her credibility to the jury. On the other hand, it is said that this aggravates the original error; that it is the same as if His Honor had said: See! here is this woman who testifies before the world, and before the defendants, and before the jury, and how can you fail to believe her? And although the law forbids me to say so in so many words, yet you are very dull if you do not perceive that I think you ought to believe her.

We do not think it necessary to notice the other exceptions, because they will probably not arise on another trial. There is error.

PER CURIAM. *Venire de novo.*

STATE *v.* GEORGE DOLLAR.

One summoned as an expert in a criminal action, is entitled to extra compensation, under the act of 1870–'71, chap. 139, sec. 133.

Motion to retax costs, heard before Watts, Judge, at Special Term, January, 1872, of Wake Superior Court.

The indictment was for rape, and Dr. E. B. Haywood was summoned, not as a witness to any fact, but as a professional expert.

It was admitted that the State was liable to be taxed with the fee for his attendance as a witness.

The Clerk, in taxing the bill of costs, was presented by the witness with a bill for $10, as a proper fee for his attend-
(627) ance. The Clerk declined to allow the same, and allowed the usual fee for attendance as a witness.

A motion was made before His Honor to retax the costs and allow the witness compensation as an expert. It was admitted that the fee of $10 was reasonable, provided witness could prove attendance as an expert.

His Honor was of opinion that the witness was not entitled to any compensation as an expert, and disallowed the motion, and directed the ordinary fee to be taxed.

From this judgment the witness, E. B. Haywood, appealed to the Supreme Court.

PER CURIAM. The Act of 1870–'71, section 133, chapter 139, shows that the Court has power to allow compensation to a witness summoned as an expert. It is admitted, in this case, that $10 was a reasonable fee. The motion to retax should be allowed. This will be certified.

STATE *v.* GEORGE HENDERSON.

If one, by trick or contrivance, gets possession of the goods of another, and act be done in such a way as to show a felonious intention to "*evade the law*," he is guilty of larceny, as where, in addition to other instances stated in *State* v. *Deal*, 64 N. C., one snatches money from the hands of a man, and immediately escapes to evade the process of law.

State v. *Deal*, 64 N. C., 270, and *State* v. *Shelton*. 65 N. C., 295, discussed, and the distinction between trespass and larceny stated by PEARSON, C. J.

This was an indictment for larceny, tried before Watts, Judge, Fall Term, 1871, of Wake Superior Court.

The charge was that the defendant had stolen "one United States Treasury note, issued by the Treasury Department of the United States of the denomination of fifty dollars," &c.

The prosecutor stated that he was in conversation (628) with a stranger at the market-house in Raleigh, that the stranger proposed that they should go on a street parallel with Fayetteville street, so as to get into a show. That after getting round on the street the stranger pulled out what is known as a *tobacco box trick*. At this time the defendant came up, and the stranger proposed to bet the defendant $10, that he could not open the box in a *given time*. Defendant took the bet, and the stranger asked the prosecutor to lend him $5 to make the bet. The witness took out a fifty and two five-dollar bills, and as he was undoing the money, the defendant snatched the two bills out of his hands, and he and the stranger ran off out of the street towards the rear of the shop and escaped.

The defendant was arrested in the town of Goldsboro, and the stranger has never been found.

Defendant's counsel asked the Court to charge the jury, that upon this state of facts he (defendant) was not guilty. The Court declined so to do. But told the jury, that if the prosecutor was to be believed, and the defendant snatched the money, with intent feloniously to appropriate it to his own use, under the circumstances detailed, &c., he was guilty.

Verdict of guilty. Judgment and appeal.

Attorney-General, for the State.
A. M. Lewis, for the defendant.

PEARSON, C. J. There is no error. I had indulged the

hope that in the opinion, *State* v. *Deal*, 64 N. C., 270, and in the opinion *State* v. *Shelton*, 65 N. C., 294, the distinction between a mere trespass and a forcible trespass on the one side, and simple larceny and robbery on the other, was so plainly set out, as to put an end to the question—so as not only to enable the Judges in the Superior Courts to act upon the distinction, as His Honor, Judge Watts, did in this case; but also to satisfy the attorneys, that if men, by stealth (629) or by force, with a felonious intent, took and carried away the personal property of another, that it was not necessary to trouble this Court with questions turning upon that distinction.

In *Deal's case*, the Court say the prominent feature of a feloneous intent is, that the act be done in a way showing an intention "*to evade the law.*" Instances are then set out of acts, that show an intention to evade the law. Taking by stealth, taking by force with blacked faces—to this we will now add another instance: snatching money out of a man's hand, *and instantly running off*, and endeavoring to get out of the reach of the hands of justice. In *Deal's case* we say, "There is no one feature of a felonious taking in the face of this transaction." In this case we say, that every feature in the face of the transaction shows a felonious intent. Contrivance, confederacy, snatching and running off for the manifest purpose of evading the law.

No error. This will be certified.

PER CURIAM. Judgment affirmed.

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(630) STATE *v.* B. F. WHITAKER *et al.*

1. The owner of land in an incorporated town may lawfully remove a house from one part of his land to another, notwithstanding that, on petition filed for the purpose, the town authorities have ordered the laying out of a street on that portion of the land to which the house was removed, the street not having been actually laid off and located prior to such removal, and the owner of the land not having notice of the petition.

2. Whether, in such case, land can be taken without just compensation, *quere;* but it certainly cannot be taken to subserve private interests, as when an inhabitant seeks to cause a street to be located on the land of another, because it will facilitate such applicant in the erection of a store to be used for his private benefit.

This was an indictment for obstructing a public street in

the town of Enfield, and was tried at the Spring Term, 1871, of Halifax Superior Court, His Honor, Judge Clarke, presiding.

The facts are sufficiently stated in the opinion of the Court.

The Attorney General, for the State.
Moore & Gatling, for defendant.

BOYDEN, J. This was an indictment charging the defendants with a nuisance in obstructing a public highway. The defendants pleaded not guilty, and on the trial the following facts were established: One Peter Forbes a citizen, and one of the commissioners of the town of Enfield, on the 5th day of September, 1870, filed his petition addressed to the Board of Commissioners of said town, of whom he was one, setting forth in his petition, "that he was the owner in fee of a vacant lot in said town; that he was desirous of erecting on said vacant lot a store—a house of business—but in consequence of an unnecessary bend in the road, the erection of his house of business would obstruct the said street, a very few feet. Therefore, your petitioner prays that your board, in order
(631) to *facilitate* your *petitioner* in the erection of said building, and to further improve the appearance and enhance the beauty of said street, leading from post-office by Whitaker's, Ward's, Johnson's and others, that you extend the same from P. Levy & Son's corner, N. E. 120 feet at right angles, to the Scotland Neck road, and your petitioner will ever pray." It further appeared, that on the 27th day of September (twelve days after the removal of the house), the petition of Peter Forbes was heard by the commissioners, and an order issued on that day for a jury of five freeholders to meet on the land designated in the petition, and to lay off the street, and to report their assessments and proceedings in due form to the board; and that on the first day of October, the jury of five freeholders went upon the land, laid off the street, but assessed no damages, and on the same day made a return to the board, signed by one of the jury. It further appeared in evidence that the defendants, when they removed their own house on their own land, had no notice of the proceeding of Forbes in filing his petition on the 5th day of September, 1870. So that the naked question in the cause is raised: Whether these defendants have been guilty of a nuisance in obstructing a public highway by moving their

own house from one portion of their own land and placing it upon another portion of it, when a petition had been filed to establish a public street, which was not laid off until after this removal?

It would seem from this short history of the case, as it appears upon the record, there cannot be the least difficulty in regard to the law of the case, and that the case does not in any way raise the grave and important question so ably discussed at the bar, by defendants, as to the power of the commisssioners of the town of Enfield to condemn the private property of an individual, for public use, without full and just compensation. And it may be worthy of remark that the petitioner, Forbes, did not ask the condemnation (632) of the land of the defendants for the use of the public, but to *facilitate him* in the *erection of* a *store*—a *house of business*—for his own private benefit. We are by no means prepared to sanction the doctrine, that private property can be taken for the *public use* without just compensation, but surely it cannot be thus taken for private use.

Upon this case His Honor charged the "jury that the defendants were not entitled to any notice of the proceedings before the Board of Commissioners, to establish or alter the street, but that as soon as the board decided to *lay off the street* it was, in contemplation of law, *laid out*, and that the defendants were guilty if they afterwards placed their house on any part of their own land, in the track of the contemplated street and before the same was actually laid off."

In this there was error. This will be certified.

PER CURIAM. *Venire de novo.*

STATE *v.* L. W. FULTON.

1. In an indictment for a misdemeanor, a defendant has a right to challange a juror for cause, and this right is not confined to capital cases.
2. Where a defendant proposes to challenge a juror for cause—and the Judge announces generally that such challenges are "unusual," except in capital cases—it is not necessary that the defendant should name the particular juror, nor assign a special cause.
3. The supposed analogy between a cause of challenge and an exception to evidence does not exist.

This was an indictment for forcible trespass, tried before Cannon, Judge, at Fall Term, of Forsyth Superior Court.

In selecting a jury, the defendant, after exhausting his per-

emptory challenges, asked to be allowed to make fur-
(633) ther challenges for *cause*. This was denied by His Honor upon the ground that it was unusual, except in capital cases. To this ruling the defendant excepted. The jury was empanelled and evidence given tending to prove the guilt of the defendant. It is unnecessary to state the facts more fully, as the opinion of the Court is rendered upon the point presented in the above statement. Verdict of guilty. Judgment and appeal to the Supreme Court.

Attorney General and *T. J. Wilson*, for the State.
No Counsel for the defandant in this Court.

BOYDEN, J. In this case, after exhausting his peremptory challenges, the defendant asked to be allowed to make further challenges, for cause; without naming any one of the jurors, or assigning any specific cause of challenge.

This right to challenge for cause was refused, His Honor holding that such challenges could only be made on trials in capital cases.

Upon this part of the record, the question arose, whether to avail himself of this apparent error, the defendant should not have named the particular juror, and assigned a specific cause of challenge; in analogy to the case of the rejection of evidence, in which case this Court has repeatedly held, that to show error in such case, the party excepting must put upon the record the evidence rejected, so this Court might determine its materiality, as otherwise the Court could not adjudge that there was error.

After much consideration, a majority of this Court are of opinion that His Honor erred, when he expressly denied this right of challenge in misdemeanors, and confined it to capital cases.

Why proceed to name the juror and assign the cause of challenge, after His Honor had distinctly announced that such challenges could only be made in capital cases?

We regret the necessity of awarding a *venire de*
(634) *novo*, as the case shows that the defendant admitted the act of violence charged, as a forcible trespass, and seemed to rely for his defense upon the ground of the unconstitutionality of the act directing the levy of the tax, for which the Sheriff made the seizure.

It seems that such a defense cannot avail the defendant.

There is error. *Venire de novo.*
This will be certified.
PER CURIAM. *Venire de novo.*

STATE *v.* R. P. ROSEMAN, *et al.*

Upon the trial of an indictment for "unlawfully and wilfully demolishing" a public school house, under chap. 24, sec. 103, Rev. Code, the record of a petition in equity of several persons, who therein claimed title to the *locus in quo*, setting forth their title thereto as tenants in common, the order for partition, the report of the commissioners, and final decree, confirming that report, among whom was a party under whom the defendants claimed, there being evidence of defendant's possession, even if not sufficient evidence of title, is certainly admissible as evidence, tending to explain the possession of the defendants and their *bona fides.*

This was an indictment for defacing, etc., a common-school house, under the statute, tried before His Honor, Judge Cannon, at Fall Term, 1871, of Rowan Superior Court.

There was evidence, tending to prove, that one T. Kesler had kept possession of the school house, from about 1863 until the time of the alleged injury, and had the house locked and kept the key. It was also in evidence, that said Kesler had claimed title to the house some time prior to the alleged injury, had consulted counsel as to his rights, and had been advised that his title thereto was good, and that he communicated his claim of title, and the legal advice
(635) received, to the defendants, and authorized them to do the acts complained.

The defendants thereupon proposed to offer in evidence the proceedings of a suit in a late Court of Equity, the same being a petition filed for partition by the heirs at law of one C. Kesler, in 1844, of whom said Kesler was one The defendants proposed to offer in evidence the petition, all the orders and decrees therein, including the appointment of commissioners to divide the land, the report of the commissioners, and to show in addition that the school-house was situated on the lot of land laid off and assigned to T. Kesler, under whom they claimed, and that the report had been confirmed by a final decree.

All this evidence was objected to by the State, and rejected by His Honor, on the ground that the report had not been registered. Defendants excepted.

There were other points made, but it is considered unnecessary to state them, as the case turned on the point above stated.

There was a verdict of guilty, and from the sentence pronounced, the defendants appealed.

Attorney General, for the State.
Blackmer & McCorkle and *Bailey*, for the defendants.

READE, J. If the defendants were in the adverse possession of the school house, and *bona fide* claiming it as their own, it certainly was not a *crime* in them to pull it down. It was, therefore, important for them to prove that fact, for the words of the Statute are, "shall unlawfully and wilfully demolish, &c." Rev. Code, ch. 34, sec. 103.

Upon the supposition that the record, which was offered and rejected, was not sufficient evidence of title upon an issue directly involving title, it was certainly evidence tending to explain the *possession* of the defendants and the (636) *bona fides* of what they did.

The rejection of this evidence was error, and entitles the defendants to a *venire de novo*, and therefore it is not necessary that we should consider the other exceptions, as they will probably not arise again.

There is error. Let this be certified.

PER CURIAM. *Venire de novo.*

STATE v. WINDSOR MASON.

1. When an assault and battery was committed on the 12th day of March, 1869, and a bill of indictment was sent and *found a true bill* on the 17th day of April, 1871, *held*, that the Statute of Limitations was a bar to the prosecution, notwithstanding a warrant was issued on the 12th day of March, 1871, tried on the 17th day of April and dismissed at the prosecutor's cost.
2. The law is well settled, that a person born on the first day of the year, will be twenty-one years of age on the last day of the year, and on earliest moment of that day. For such purposes the law does not regard the fractions of a day.

This was an indictment for an assault and battery, tried before Mitchell, Judge, at Fall Term, 1871, of Wilkes Superior Court.

It was in evidence that the offense was committed on the 12th day of March, 1869, and the bill of indictment was not sent until after the expiration of two years from the commission of the offense, viz: on the 17th day of April, 1871. To rebut the Statute of Limitations, (which was relied upon by the defendant) the State relied upon the fact that a warrant was issued and served on the defendant upon the 12th day of March, 1871. The said warrant was returned before a Justice of the Peace, and tried on the 8th day of April, 1871, and dismission at the cost of the prosecution.

His Honor held that as the warrant was taken out
(637) before the expiration of the two years, after the commission of the offense, the defendant could not avail himself of the statute of limitations.

There was a verdict for the State. Judgment and appeal by the defendant.

Attorney General and *W. P. Caldwell*, for the State.
Armfield, for defendant.

BOYDEN, J. This was an indictment for assault and battery, committed on the 12th day of March, 1869; the indictment having been found, on the 17th day of March, 1871, more than two years after the commission of the alleged offence. The defendant relied upon the statute barring such indictment after two years. The State's counsel, to repel the lapse of time, offered in evidence a State's warrant, taken out against the defendant for the same offense, by the prosecutor, dated the 12th day of March, 1871, and this warrant, upon the examination by the Justice, was dismissed at the cost of the prosecutor.

In the first place, it is to be remarked that the two years had expired before suing out the warrant, on the 12th day of March, 1871. The law is well settled, that a person born on the first day of the year, 1800, would be twenty-one years old, on the last day of the year, 1820, at the earliest moment of that day; as for such purposes the law does not regard the fraction of a day. And in this case if it had been proved that the offense had been committed at 11 o'clock P. M., on the 12th day of March, 1869, the two years would have expired on the 11th day of March, 1871, at the earliest moment of that day.

But waiving this, upon what principle of law can it be said

that the taking out of a warrant in this case, which was dismissed on the hearing, could operate to repel the lapse of time, we are wholely unable to comprehend. Had the defendant been bound to Court to answer the charge,
(638) there might have been some plausible ground for insisting that suing out the warrant before the expiration of two years, was the commencement of the very prosecution of the offence for which the indictment was found, but in having been dismissed on the hearing, there is not a shadow of reason for such an allegation.

There is no error. This will be certified.

PER CURIAM. Judgment reversed.

STATE *v.* JOEL LOWHORNE.

1. The admissions of guilt of one who had, prior to making such admissions, been induced, by fear or the hope of benefit, to confess himself guilty of a criminal charge, cannot be used against him, unless it be shown by the most irrefragable evidence that the motives which induced the first confession had ceased to operate.
2. Hence, when a party had been persuaded to make a confession of guilt, through a promise of immunity from prosecution therefor; *Held*, that in the absence of clear proof that such inducement had ceased to operate, his confessions touching the same offence, thereafter made, were inadmissible.

The cases of *State* v. *Roberts*, 1 Dev., 259, and *State* v. *Lawson*, Phil. L., 47, cited and approved.

This was an indictment for robbery, tried before His Honor, Judge Watts, at Fall Term, 1871, of the Superior Court of Johnston county

On the trial the State proposed to introduce in evidence the confessions of the prisoner, made during Fall Term, 1870, to one Porter.

The defendant objected, and offered to show that *previously* to that time the prisoner had been induced to make confessions in consequence of a promise to him not to be prosecuted for the offence if he did.

His Honor being of opinion that, assuming such
(639) to be the case, it would not have the legal effect to exclude the evidence of subsequent confessions, admitted the evidence proposed by the State.

The defendant excepted. There was a verdict of guilty, and, after sentence, the prisoner appealed.

The Attorney-General, for the State.
Busbee & Busbee, for the prisoner.

BOYDEN, J. In this case the only question for our decision is as to the admissability of the confessions of the defendant.

The case as made is somewhat obscurely stated; but we take it that the defendant had first been induced to confess under the confident belief that if he did confess he would not be prosecuted. And this being so, the question is, whether a subsequent statement of the facts of the case, made secretly to the witness, was admissible. There being no evidence to show that the same motives that induced the defendant to make the first statement, were not still the operative motives to the subsequent statement. In the case of *State* v. *Roberts*, 1 Dev., 259, Henderson, Judge, says, "confessions induced by hope, or extorted by fear, are, of all kinds of evidence the least to be relied on, and are, therefore, entirely to be rejected." It seems to be admitted in this case, that the confessions just made, were of that character and were therefore rejected; but that being repeated to the same person some time afterwards, they lost their original character, assumed that of free and voluntary ones, and became evidence of the truth. How or whence does it appear that the motives which induced the first confession, had ceased to operate when it was repeated? It is not incumbent upon the prisoner to show that they resulted from the same motives. It is presumed that they did; and evidence of the most irrefragable kind should be
(649) produced to show that they did not. It is sufficient that they may proceed from the same cause. See *State* v. *Lawson*, Phil. Rep., 47.

So, in our case, if we have properly understood it, the first confessions were made with the expectation that if he made a candid disclosure, he could not be prosecuted, and there is nothing to show that the motives which induced the first statement did not still continue. It is true, that in the case of the *State* v. *Roberts*, the confession was made to the same person, but that, we think, can make do difference.

There is error.

PER CURIAM. *Venire de novo.*

STATE *v.* BENJAMIN STATON.

1. An indictment under the Act of 1868–'69, chap. 253, concerning the killing, &c., of stock "in any inclosure not surrounded by a lawful fence," which simply charges the injury, &c., to have been committed on stock in "the field" of one A. B., is not certain to that extent required in such pleading, and after a conviction on such indictment, a motion in arrest of judgment will be sustained.
2. Such a defect is not an informality or refinement within the purview of the 14th sec. of 35th chap. of the Rev. Code, but is a failure to express the charge against the defendant in a plain, intelligible and explicit manner.

The case of *State* v. *Stanton*, 1 Ired., 424, cited and approved.

This was a motion in arrest of judgment made after conviction at Fall Term, 1871, of the Superior Court of Transylvania county, His Honor, Judge Cloud, presiding.

The indictment is in these words, viz.: "The jurors for the State upon their oath present that Benjamin Staton, late of the county of Transylvania, on the 10th day of October, 1868, with force and arms at and in the county aforesaid, unlawfully and wilfully did abuse, weary* and injure the
(641) stock, to-wit: the hogs of one Isaac Heath, then and there being in the field of the said Benjamin Staton, the same not being surrounded by a lawful fence, to the great damage of the said Isaac Heath, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State."

GUDGER, Sol.

His Honor sustained the motion, and arrested judgment; from this ruling, Mr. Solicitor Henry appealed to this Court.

Attorney General, for the State.
David Coleman, for the defendant.

Dick, J. The Statute, (Acts 1868–'69, chap. 253,) declares: "That if any person shall kill or abuse any horse, mule, cattle, hog, sheep or neat cattle, the property of another *in an inclosure, not surrounded by a lawful fence,* such person shall be deemed guilty of a misdemeanor, &c.

The indictment charges that the defendant Benjamin Staton "unlawfully and willfully did abuse and injure the stock, viz: the hogs of one Isaac Heath, then and there being in the *field* of the said Benjamin Staton, the same not being sur-

*Probably a mistake for "worry."

rounded by a lawful fence." After a verdict of guilty, the defendant moved to arrest the judgment, on the ground that the offence created by the Statute was not charged with sufficient certainty in the bill of indictment.

In setting out a Statutory offence in an indictment, it is in general sufficient to describe it in the words of the Statute, if every fact necessary to constitute the offence is de-
(642) clared in the Statute with certainty and precision, 2 Hawk, ch. 25, sec. 3. Arch. Cr. Pl., 51.

As criminal statutes are usually drawn with deliberation and skill, it is the safest course to pursue strictly the words of the statute, as it precludes all questions about the meaning of the words used, and the Courts have always shown a great tendency in criminal proceedings to adhere to the strict letter of the law. It is not always absolutely essential to follow precisely the words of the statute; equivalent words, in an indictment, will be held sufficient, but they must state all the circumstances which constitute the definition of the offence in the statute, so as to bring the defendant clearly within it. *Commonwealth* v. *Bean*, 2 Leading Cr., C. Heard, 172, and notes. Bish. C. P., sec. 291, 269. *State* v. *Stanton*, 1 Ired., 424.

There have been hundreds of decisions in the Courts of Englandand of this country upon this question, and no rule has been laid down which will meet every case that may arise on this subject.

Mr. Archbold states a rule which will generally be found applicable. "When a word not in the statute, is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it and includes it, the indictment will be sufficient." Arch. C. P., 52.

In our case the words used in the statute in describing the offence, is "inclosure," the word substituted in the indictment is "field," and we have to consider whether the words come within the above rule.

Inclosure is a general term which includes several specific things: as, a farm, public square, cemetery, fortification, etc. The modified meaning of the word as used in the statute, is ascertained by reference to a statute *in pari materia* (Rev. Co. ch. 48,) to be "*inclosed* grounds," used for the purpose of habitations and husbandry, and separated from woodland or

common by a fence or wall of some kind. Such an (643) inclosure may be a yard, garden, orchard, field, etc. The word field has not as extensive a signification as inclosure, and therefore, the terms are not equivalent and the less cannot include the greater.

The word "field," has no technical signification in law (1 Chit. Pr., 160), and we see by reference to Webster's Dictionary, that it has thirteen different meanings.

The farmer speaks of a field, as part of his farm separately enclosed; but the word is often used in common parlance to distinguish cleared land from woodland. Thus, we often say, "old field," which generally signifies a piece of land uninclosed. Thus it appears, that the indictment founded on the statute, instead of the words of the statute, uses other words which may have a different signification. The charge in the indictment may be strictly true, and yet the defendant be not guilty of the offence contemplated and defined in the statute.

The defect in the indictment is not cured by the statute (Rev. Code, ch. 36, sec. 14), as it is not an "informality and refinement," but it is a failure to "express the charge against the defendant, in a plain, intelligible and explicit manner."

The ruling of His Honor was correct, and the judgment is affirmed. Let this be certified.

PER CURIAM. Judgment affirmed.

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(644) STATE *v.* BOB THORN.

1. When an order was forged and drawn, in the name of an overseer and agent, upon his principal, and the purpose was to defraud the principal, the indictment for such forgery must aver that the person whose name was forged, was the agent, and that he had authority to draw upon his principal; otherwise, the Court cannot see that the false paper had a tendency to defraud the principal, or, how it could have been issued for such a purpose.

2. The distinction between this case and *State* v. *Lamb*, 65 N. C. R., 419, stated by PEARSON, C. J.

State v. *Greenlee*, 1 Dev., 323, cited and approved.

Indictment for forgery, tried before Moore, Judge, at Fall Term, 1871, of Edgecombe Superior Court.

The following is a copy of the indictment:

"STATE OF NORTH CAROLINA—EDGECOMBE COUNTY.

Superior Court, Fall Term, 1871.

"The jurors for the State, upon oath, present that Bob Thorn, *alias* Benj. F. Mayo, *alias* Benjamin Cherry, late of Edgecombe county, at and in said county, with force and arms, on the 5th day of September, 1871, did feloniously and unlawfully forge a certain order, which said forged order is as follows:

"'Judge Howard 20 days work at one dollar per day, and 14 days at 75 cents. FATE JOHNSON.

'"Please pay Bob twenty days works at one dollar per day, 14 days at 75 cents per day. Commenced work August 1st; stopped 5th day of September, 1871.'

"With intent to defraud one George Howard, contrary to the statute and against the peace and dignity of the State."

There was evidence to show that the defendant had (645) forged the order as set forth in the indictment, and that he had presented it and received part of the pay from (Judge) George Howard. There was also evidence that the person whose name was forged (Fate Johnson) was the agent and manager for Judge Howard, and had a right to draw on him, and that his orders were generally paid.

Under instructions from the Court the jury found the defendant guilty. Judgment and appeal.

In this Court there was a motion in arrest of judgment.

Attorney General, for the State.
J. L. Bridgers & Son, for defendant.

PEARSON, C. J. The bill of indictment is defective in this: there is no averment to connect Johnson with Howard so as to show that Johnson had authority, as the agent of Howard, state the account of laborers and draw on him for the balance due. Without this averment, there is nothing from which the Court can see, that the false paper had a tendency to defraud Howard, or, how it could have been issued for such a purpose. *State* v. *Greenlee*, 1 Dev. 323. "The writing must have a tendency to injure; that tendency must be apparent to the Court, either by the face of the writing or by an aver-

ment of facts extrinsic, showing the tendency to injure." *Rex* v. *Wilcox*, *Russell* v. *Ryan*, Cr. cases, 50.

The indictment must aver, that the party purporting to have signed the false paper, had authority to sign and bind the party alleged to have been defrauded. In *State* v. *Lamb*, 65 N. C., 419, the intent charged was to defraud Hyatt, the party whose name was forged, so the intent was apparent without the averment of extrensic facts.

This distinguishes the cases. Error. The judgment is arrested.

PER CURIAM. Judgment arrested.

(646) STATE *v.* PHILLIPS.

No appeal is allowed on the part of the State, where a general verdict of not guilty has been rendered.

The cases of *State* v. *Jones*, 1 Murphy, 257; *State* v. *Taylor*, 1 Hawks, 422; *State* v. *Credle*, 63 N. C. R., 506, cited and approved.

This was an indictment for larceny, tried before Clarke, Judge, at Fall Term, 1871, of Green Superior Court.

It was in evidence that the defendant had been arrested and carried before one Busbee, a Justice of the Peace, before whom he confessed the theft. The Justice said, "I read the warrant to him, and asked him if he was guilty or not? He said *guilty*." The confessions of the prisoner were reduced to writing. The Justice said, "He had not informed the prisoner that he was not compelled to answer."

The State proposed to introduce in evidence the confessions of the prisoner. They were rejected by His Honor upon the ground that under the Act of 1868–'69, it was the duty of the Justice of the Peace to propound the preliminary question.

There was a verdict of not guilty, and the State appealed.

Attorney General, for the State.
No counsel for the defendant.

BOYDEN, J. No appeal is allowed on the part of the State where a general verdict of not guilty has been rendered.

This was decided as far back as 1809, in the case of the *State* v. *Jones*, 1 Mur., 257; again in 1824, in the case of the *State* v. *Taylor*, 1 Hawks, 462, and recently in the case of the

State v. *Credle*, 63 N. C. R., 506. As no appeal could be taken by the State, the question in regard to the com-
(647) petency of the evidence rejected, does not arise.

There is error. Appeal dismissed.

PER CURIAM. Error.

STATE *v.* FRANKLIN FREEMAN.

1. Upon the rendition of a verdict of not guilty against a defendant in an indictment, he is entitled to his discharge, nothing more appearing against him.
2. A Judge has no right to set aside a verdict of not guilty, nor to grant a new trial, on the motion of the State.

State v. *Phillips*, at this term, cited and approved.

This was an indictment for an assault and battery, tried before Tourgee, Judge, at Fall Term, 1871, of Alamance Superior Court.

Upon the evidence in the case, the jury returned a verdict of not guilty.

After the verdict had been rendered, the Solicitor for the State moved to set it aside, upon the ground that one of the jurors had been improperly sworn; the juror, on account of conscientious scruples, having declined to swear upon the book. Whereupon the clerk administered the affirmation prescribed for Quakers, Dunkards, &c.

His Honor entertained the motion of the Solicitor and set aside the verdict, from which order the defendant appealed to the Supreme Court.

Attorney General, for the State.
Parker, for the defendant.

READE, J. Upon the rendition of the verdict "not
(648) guilty," by the jury, nothing more appearing against the defendant, he was entitled to be discharged, and it was the duty of the Court to render judgment accordingly.

His Honor had no power to set aside the verdict for the cause assigned, nor to grant a new trial on motion of the State, nor had the State the right of appeal. See *State* v. *Phillips*, at this term.

This will be certified to the end that the defendant may be discharged.

PER CURIAM. Judgment reversed.

STATE *v.* FRANK BEATTY.

1 It is not the sole purpose of the Act relative to "Bastard Children," Rev. Code, chap. 12, to require the putative father to indemnify the county, but likewise to maintain the child.

2. As to past maintenance, there is no difference between that and future maintenance, so far as the power of the Court is concerned.

3. When a person was charged with being the father of a bastard child and gave bond for his appearance at the next term of the Court, and before the term of the Court, the child died; *Held*, that it was error in the Court to discharge such putative father upon payment of costs, and, without making any order or requiring him to give bond. What kind of order, should be made in such cases, is in the discretion of the Court. The Statute seems to require *some order* in every case.

State v. *Harshaw*, 4 D. & B., 371, cited and approved.

This was a proceeding in bastardy, before Mitchell, Judge, at Fall Term, 1871, of Catawba Superior Court.

The mother of the child had been examined before its birth, by a Justice of the Peace, and the defendant had been recognized to appear at the next term of the Court. The (649) examination and proceedings were admitted to be regular.

The defendant appeared and proved to the Court that the child was born alive, lived several days, but died before this Term of the Court. Whereupon he moved to be discharged upon payment of costs. This motion was resisted by the Solicitor, who asked that the defendant be required to give bond to perform such orders as the Court might see proper to make, and on failure to do so, that he be committed. The Court ordered that the defendant be discharged upon payment of costs. From which order the relator appealed.

Attorney General, for the relator.
J. M. and M. L. McCorkle, for the defendant.

RODMAN, J. The defendant was duly charged, by a single woman, with being the father of a child with which she was pregnant, and he entered into recognizance for his appear-

ance at the Superior Court. On proof before the Court that the child had been born since the date of the recognizance, and had died after living a few days, the defendant moved to be discharged on payment of costs, which the Judge allowed, and the State appealed. The only question is, whether the supposed father could lawfully have been charged with the maintenance of the child during its short and past life. We are told that it is a question of some practical importance, as such cases frequently occur and the Judges doubt about their power. It depends on the construction of sec. 4, chap. 12 of Rev. Code, entitled "Bastard Children." That section says that when any man shall be accused by a single woman with being the father of her bastard child, he shall be entitled to have an issue made up to try the paternity, and "if the jury shall find that the person accused is the father of such child or children, he shall stand charged with the maintenance thereof as the Court may order, and shall give bond,
&c., to perform said order, and to indemnify the county,
(650) &c." If the sole purpose of the Act was to indemnify
the county, it is clear that, as it did not appear that the county had been or was likely to be damaged, the Court had no right, after the putative father had admitted the paternity by declining to make up an issue, and after proof of the child's death, to do anything more than to require him to pay the costs. But we think it equally clear that if the statute had the further purpose to impose on the father the maintenance of the child, then it was within the power, and it was the duty of the Court, to require him to give a bond, and thereupon to make an order charging him with the past maintenance of the child, notwithstanding its death. The purpose of the statute must be gathered from its provisions. Sec. 1 requires every single woman pregnant or delivered of a bastard child to declare its father, whether the child is likely to become chargeable to the county or not. If she refuses to declare the father, then, as there is no way to charge the father with the maintenance, she is required to give a bond only to indemnify the county. Section 4, which I have already cited, says, the father shall stand charged with the maintenance of the child, as the Court may order, and shall give bond to perform said order *and* to indemnify the county. Section 7 says, that when the father has been charged with the maintenance of the child, and neglects to perform the order, execution may issue against him, "*provided* that the

party aggrieved by such non-payment shall apply for the same."

In considering these sections it seems to us that section 4 clearly contemplates that the father shall *both* maintain the child and indemnify the county from any expenses attending it of any sort whatever. And sec. 7 seems to suppose that there will be a party aggrieved by his failure to perform the order other than the county, which there could not be if his duty was confined to indemnity. It is said the mother may be rich and abundantly able to maintain the child. But the common law imposes no such legal liability on her, at least after the child has passed the age of nurture, and the
(651) statute intended to impose that duty on the father, where it more properly belongs.

Then as to past maintenance: There is no distinction between that and future maintenance, as far as regards the power of the Court. Judge Ruffin in *State* v. *Harshaw*, 4 D. & B., 371, distinctly recognizes the power of the Court to provide for past and future maintenance, as well as for the indemnity of the county.

Indeed, it is difficult to see how any proof of the death of the child could properly be received until after the defendant had given bond, and the question arose, as to what. the order of maintenance should be. Before giving bond, the only defense open under the Act is a denial of the paternity.

If the Judge had thought he had the power to require a bond and then declined to charge the defendant with past maintenance, upon the ground that it was discretionary in him to do so, we should doubt whether the exercise of the power was discretionary.

Certainly, it was entirely in his discretion what sort of an order of mainienance he should make; but, it seems, that the statute intends some order in every case. But, in this case, the Judge appears to have declined because he doubted his power. We think he erred. Judgment reversed. and the case remanded to be proceeded in according to law.

PER CURIAM. Judgment reversed.

APPENDIX.

DISCUSSION BY MR. JUSTICE RODMAN, REFERRED TO IN THE NOTE TO THE CASE OF WINSLOW vs. WEITH, REPORTED *ante* 432,

AND

PROCEEDINGS OF THE BAR AND COURT UPON THE DEATH OF EX-GOV. BRAGG.

APPENDIX.

DISCUSSION BY MR. JUSTICE RODMAN, OF THE RIGHT OF THE COURT TO AVOID AN ACT OF THE LEGISLATURE, WHICH LEVIES A TAX EITHER IN DISREGARD OF THE CONSTITUTIONAL EQUATION OF TAXES, OR, BEYOND THE LIMITS OF TWO-THIRDS OF ONE PER CENT. PRINTED BY ORDER OF THE COURT; SEE NOTE TO WINSLOW and WEITH, *ante* 432.

I. If the Legislature imposes taxes without regard to the equation between property and polls, can the Courts declare the Act void *in toto?*

II. If, in a tax act, it exceeds the limit (in a case not excepted from it), can the Courts declare the Act void *in toto*, or for the excess? and if for the excess, only, how will the Courts proceed to enforce the Act within the limit?

III and IV. The same questions in respect to county taxation.

These questions are thus separately stated, because although there are certain general views bearing on, and perhaps decisive of all of them, yet these are considerations, either peculiar to each, or at least bearing more forcibly upon one than another.

It will be noted, too, that I consider the question to be not as to the legislative power and duty under the Constitution, but, as to the power of the Courts within the proper sphere of judicial power, to enforce its duties upon the Legislature by declaring its Revenue Acts void in whole or in part, for the reasons suggested here.

It seems to me, that the two questions as to the power and duty of the Legislature, and the power and duty of the Courts in the premises are totally distinct. Clearly, it is the duty of the Legislature in its Revenue Acts to observe the equation of taxation, and to keep the State tax not only within the extreme limit, but also so much within it, as to allow the counties, by an additional tax within it, to provide for their legitimate needs. It may also be admitted, that except in the excepted cases, (as to which there is no question at present) the Legislature has no right to disregard either of the constitutional requirements, if within its power to observe them.

But it will by no means follow that there is a corresponding power in the Courts of the State to correct the legislative violations of duty. If these Constitutional mandates cannot (by reason of the limits imposed on the judicial power), either by the nature of the judicial power in itself, or by the restraints put on that power in the Constitution, (656) be enforced by the Courts, then in the given case, it will only follow that this duty, like so many others of the highest moral obligation, must be classed among what are called "duties of imperfect obligation," imperative on the conscience, but imperfect only in the sense that they must be left to the conscience and cannot be enforced in any other forum.

Under this head of "duties of imperfect obligation," ethical writers class all of our religious, and nearly all, of our domestic and political duties. There are many mandates in our Constitution that are of that character. As instances, I may refer to section 14 of Art. II, where the Legislature is forbidden to pass any private law unless thirty days' notice

of the application for it shall have been given; to section 16, requiring all money bills to be read three times, etc.; to section 25, of a similar import; to section 1 of Art. VIII, forbidding special incorporations, except under certain circumstances; to the provisions of Art. XI, requiring the establishment of sundry charities.

In deciding whether the Courts have the power to declare any given Act of the Legislature void, I think it may be assumed that it has not the power if its exercise involves the assumption of powers not judicial but legislative in their nature.

By the Constitution, "the Legislative and Supreme Judicial powers shall be forever kept separate." The Courts jealously guard their own peculiar powers. If the Legislature should undertake to decide a suit between individuals, the Courts would disregard the decision. And in the same spirit they should be (as I believe this Court has always been) equally cautious to abstain from entering upon a line of action which, if followed out, must lead to its taking upon itself practically the duty of legislating in a matter peculiarly of a legislative nature—the imposition and appropriation of taxes.

After these general views, I recur to the questions as previously stated:

I. Article V, section 1, of the Constitution says: "The General Assembly shall levy a capitation tax on every male inhabitant over twenty-one, and under fifty years of age, which shall be equal on each to the tax on property value at $300 in cash"; "And the State and county tax combined, shall never exceed two dollars on the head."

This commands two things:

1. That the poll tax shall always be equal to that on $300 valuation of property; this has been called the equation of taxation.

2. That the State and county poll tax shall not exceed $2. This fixes the limit of taxation on polls, and consequently on property.

These two directions are equally definite and positive; they are in no wise inconsistent with each other; it is impossible that one has any more favor or sanctity than the other, merely because it comes earlier or later in the sentence; they must be qually binding on the Legislature.

But while the moral obligation of these two commands is equal, it may be that the one may be enforced by the Courts, without an assumption of legislative power, while the other cannot be. This, it seems to me, is the case. On so difficult and novel a question, it would be unbecoming to be rash or dogmatic. I entertain my opinions with great respect, not only for those of my brethren, but of all other candid thinkers.

Can the Courts enforce the equation?

(657) The command to observe the equation, has no exemption except that in section 4, where a tax is levied to pay the public debt; it can at all times be obeyed by the Legislature without any conceivable detriment to the State; whether it has been observed in any particular revenue Act or not, can never be a question of any doubt. If, therefore, a Court can under any circumstances whatever, declare a revenue Act void, as violating the Constitution, I do not see why an act which violates this command, should not be so declared. That a Court may declare a revenue Act void, I conceive to be settled by precedent.

If an Act be void, because it violates the Constitution in this respect, it must be void *in toto*. I admit there is much difficulty in dealing with this question, but we are obliged to deal with it in deciding the case. All we can do is to give it the most cautious consideration, and then state the results. In considering this particular question as to whether an Act which disregards the equation is void *in toto* or only in part, we must put out of view altogether any supposed, or real, limitation of the

amount of the tax; which would complicate the subject too much. We wlil suppose, then, a State tax to be $3, on the poll, and $5 on the $300 valuation. If not void *in toto*, how shall the equation be effected? by bringing down the higher tax to the lower? or, raising the lower to the higher? On reason occurs to one why either of these courses should be preferred to the other. Moreover, the adoption of either would be an act of legislation. To raise the poll tax, would be the judicial levy of a tax; to reduce the property tax, is not so manifestly an act of legislation; but for reasons which I shall give, when I come to consider the question as to the limit of taxation, it seems to me that such a reduction will require the Court to assume legislative power, and is therefore as improper as the other course would be. It may be said, however, if declaring the whole Act void, is not legislation, how is declaring only the excess so? The answer is, to declare the whole Act void, is only in effect to declare that the Legislature has adjourned without passing any revenue Act, and would only require them to re-assemble to do so. Whereas, to declare it void for excess over the rate only and good for the residue, would involve the entering by the Court, into questions as to the application of the reduction of taxes for particular purposes, which would necessarily lead it into a line of action essentially legislative in character, and the reasons for this opinion will be more properly given hereafter.

This brings us to the second question—

II. As to the power of the Court to avoid or correct a revenue Act which exceeds the limit.

In deciding such a question it cannot be put upon any narrow grounds. It is easy to say *lex ita scripta*. But I conceive that is to miss the point. What is it that is written? A rule of duty for the Legislature; but not a command to the Courts to enforce it, if to do so will require them to go out of their strictly judicial path.

Unless we are thoughtless of the confusion and mischief which our decision will produce, we must foresee as far as we can, how it will work out. This can only be done by putting practical cases.

(658) The purposes of legitimate taxation by the State may be divided for the present discussion into four heads:

I. To defray the absolutely necessary purposes of the government, such as the support of the Executive, Legislative and Judicial Departments.

II. Useful but not essential objects, such as the erection of the Penitentiary, the report of the various asylums, &c.

III. The extraordinary case of an invasion or insurrection.

IV. To pay the interest of the new debt of the State legally contracted, as for example, for unfinished railroads, &c.

If the limit is applicable to a tax for any of these purposes, I know of no reason why it is not applicable to all. We will suppose, then, that a tax is laid up to the limit for any of these purposes, and over the limit for the others; and it would be immaterial whether this was done by a single Act or by several, as all Acts passed at the same session, when not otherwise directed, date from the same time. Note, now, that the Constitution says: "Every act levying a tax *shall state the special object* to which it shall be applied, *and it shall be applied to no other purpose.*" Constitution, Art. 5, Sec. 8.

How could the Court proceed to deal with such an act, when a taxpayer brought an action against the Sheriff, as is done here?

In the first place, the necessities of the State might require the limit to be exceeded for those purposes alone. Could a Court revise the question of necessity and expunge any portion of the tax for such purpose?

Is it not clearly and exclusively a legislative power to decide on questions of State necessity. The supposition is by no means a groundless one. I do not pretend to be familliar with the statistics of taxation in this, and still less in other States. But I think I would not be wrong in saying that no year has passed, since 1868, in which the taxes have not, for State and county purposes, in most counties, exceeded the supposed Constitutional limit, of two-thirds of one per cent. on the valuation of property. I think that there is no old State in the Union in which they do not constantly exceed that rate. I believe that the attempt to maintain the State and County Governments, with such an absolute limit, will be found a failure.

Secondly. In a case where the taxes of the first class—that is, for purposes absolutely necessary,—did not exceed the limit, but those which may be supposed to belong to other classes did, how could the Courts deal with such a case? Would they undertake to distinguish between the classes and to say which taxes were for necessary purposes and, therefore, to be saved, and which, although for legitimate and important purposes, were the less necessary, and, therefore, to be made void? Would not an attempt to do so be a clear invasion of the legislative functions?

It would not answer for the Court simply to declare that the Act was void as to the excess of the tax. It must of necessity go on and declare which particular tax, or how much of the tax for each particular purpose, is void. Otherwise, as each tax is laid for a specific purpose, and can be applied to no other, it will be impossible for the executive and disbursing officers of the State to know to what purposes the money received shall be applied. Shall it be left to their discretion? That is, to violate the Constitution, by allowing them to apply the tax to purposes other than those designated in the Act, and to compel them to usurp legislative power at the risk of anarchy.

Then could the Court undertake to reduce the tax for each
(659) several purpose *pro rata?* That might leave an insufficiency for necessary purposes, while to undertake to apportion them according to its views of the relative necessity and propriety of the several purposes, would be palpable legislation.

It must be recollected, that if the Supreme Court possesses this power, it is not confined to that Court; every Superior Court and every Justice of the Peace possess it equally in the first instance to the amount of his jurisdiction. In a domain of government where the public welfare requires most, that all should be order and obedience, a scene of unexampled uncertainty would be introduced by this usurpation of legislative power. It seems to me unwise for the Courts to enter on any path which has such an outlet.

Thirdly. I will suppose another case: where the Legislature for the several necessary and legitimate purposes of the State government imposes a tax up to, but not beyond the limit, thus leaving no margin for necessary county taxation. Can the Court declare it void? It is not beyond the admitted power of the Legislature. Will the Court reduce it? Then upon what principles? And will it not be an usurpation of Legislative power? If the counties will go on and levy taxes for the indispensable uses of county government, will the Court declare them void, and permit these purposes to fail—the jurors and witnesses in criminal prosecutions to go unpaid; the State's prisoners to be unfed, and the poor to perish?

It seems to me superogatory to pursue these inquiries further. It must be admitted that no Court can do these things, and yet, if it undertakes to control the legislative power of taxation, within a supposed limit of

amount, it must do these things, or introduce anarchy. The usurpation of legislative power, if it be begun, must be thorough.

I believe that no other State Constitution has attempted to limit the power of the Legislature as to the rate of taxation. The experiment is wholly new. Of course no authority can be expected to guide us in considering it. But the language of C. J. Marshall in *McCollough* v. *State of Maryland*, 3 Wheat., 428, certainly seems to assume that the power of taxation must, *in its nature*, be illimitable over the objects to which it is applicable. This argument is already so long that I forbear to quote them.

PROCEEDINGS OF THE BAR AND COURT

UPON THE

DEATH OF EX-GOV. BRAGG.

A meeting of the members of the Bar of North Carolina convened at the Supreme Court rooms on the 22d day of January, 1872.

The meeting was called to order by Samuel F. Phillips, and upon his motion, Chief Justice Pearson was appointed Chairman, and Col. D. M. Carter Secretary of the meeting.

The Chairman announced the object of the meeting to be to take appropriate action by the Bar of the State, now in attendance on the Supreme Court, respecting the death of Ex-Governor Thomas Bragg, and invited suggestions from anyone present.

Gov. T. R. Caldwell announced to the meeting that the funeral ceremonies would commence at the late residence of Gov. Bragg at 3½ o'clock, P. M., and also the order in which the procession would be formed to accompany the remains of Gov. Bragg from his late residence to the Episcopal Church, and thence to the cemetery.

On motion of T. R. Caldwell, it was resolved that the members of the Bar of North Carolina, now present, would form in procession and accompany the remains of Ex-Governor Bragg, to their last resting place, in respect to his memory.

It was also resolved on motion of Mr. Phillips:

That this meeting re-assemble at the rooms of the Supreme Court on to-morrow at 1 o'clock, P. M.

The meeting then adjourned and formed in procession in the Capitol Square, with the Executive and Legislative Departments.

SUPREME COURT ROOMS,
JANUARY 23rd, 1872.

A numerous attendance of the members of the Bar of North Carolina was called to order by Chief Justice Pearson, at 1 o'clock, P. M.

Judge Battle moved the appointment of a committee of five to draft resolutions suitable to the occasion.

The chairman thereupon appointed Ex-Judge W. H. Battle, Messrs. B. F. Moore, D. M. Barringer, S. F. Phillips and J. H. Wilson.

The committee subsequently reported the following resolutions through their chairman, Judge Battle, who also addressed the meeting briefly in eulogy of the character of the deceased.

The death of the Hon. Thomas Bragg, one of the most eminent
(661) members of our profession, while it fills our hearts with sadness, calls upon us for an expression of our feelings of admiration for his character, and for a sincere tribute to his memory. We are all impressed with the fact that yesterday must long be held in remembrance by the citizens of this State, and especially by those of this city. The cessation of business, the adjournment of the Supreme Court, of the

Superior Court for the county of Wake, and of both Houses of the General Assembly, and the large attendance at his funeral, all speak in terms not to be mistaken, that a great and good man has been taken from us. A brief sketch of the leading incidents of his life may have its use and will not, we trust, be deemed inappropriate to the occasion.

Thomas Bragg, the fourth child of Thomas Bragg and his wife, Margaret, was born in the town of Warrenton, in this State, on the 9th day November, 1810, and received the earlier part of his education at an excellent school, kept successively in that place by such teachers, among others, as gentlemen who afterwards became Bishop Freeman, of Arkansas, and Bishop Otey, of Tennessee. His parents, though in straightened circumstances, having determined to give all their large family of children a thorough education, sent their son Thomas, at the age of sixteen, to the Military School at Middleton, Connecticut, then under the charge of Captain Alden Partridge. He remained there two years and a half, and greatly profited in after life by the instruction and training which he then received. A short time after he returned home, he commenced the study of the law under the late Hon. John Hall, who was then one of the Judges of the Supreme Court. After obtaining license to practice in all the Courts of the State, he settled at the town of Jackson, in the county of Northampton, and practiced his profession in that and the adjacent counties for many years with great success. In 1842, he was elected by the Democratic party a member of the House of Commons, and took an active part in the proceedings. In 1854, he was elected by the same party, Governor of the State, and was re-elected to the same high office in 1856.

It was acknowledged by all parties that he discharged his executive duties with great ability and impartiality, so that no one was surprised when, near the close of his gubernatorial career, he was elected to the Senate of the United States. He was a member of that august body when the resolution of secession was passed by a Convention of the people of his own State, and he then felt it to be his duty to resign his seat in the Congress of the United States, and to act under that sovereignty to which he had been taught that his first allegiance was due. After the establishment of the government of the Confederate States, he was called upon to assist in its administration, by taking, for a time, the high and responsible office of Attorney General. After the close of the war, and the return of peace, he found that his pecuniary means were greatly diminished, and that it was necessary for him to devote himself entirely to the practice of his profession, in order that he might support and provide for his beloved wife, and also to educate the numerous and interesting family of children with which his household was blessed. How well, how nobly, and how successfully he was performing that sacred duty when arrested by the hand of death, we all know. We
(662) know, too, that while he attended to the interests of his clients with fidelity and great ability, he treated his professional brethren with uniform courtesy and kindness, and that he never forgot the respect which was due to the Courts before which he practiced. While we cannot but feel the deepest regret that he is taken from us forever, we find consolation in the reflection, that as a member of our profession, as a citizen of our State and of the Union, in private life and in public life, he has left us an example which we may do well to imitate, and a memory which we will always cherish with fond affection, and look back upon with the most sincere respect, and with the highest veneration.

As a fitting tribute of respect to such a man,

Be it resolved:

1. That a copy of the proceedings of this meeting be sent to the family of the deceased by the Chair.

2. That a copy of the proceedings be presented to the Supreme Court, and to the Superior Court of the county of Wake, with a request that they be entered upon the minutes of their respective Courts.

3. That copies of the proceedings of this meeting be furnished for publication in all the city papers.

Mr. Moore in seconding the motion to adopt the resolutions, addressed the meeting in high eulogy of the leading traits of character displayed by Governor Bragg in his private and official career.

Mr. D. M. Barringer followed in a just and discriminating address in praise of the learning, ability and integrity of Governor Bragg as a lawyer, and in explanation of his course as a Senator of the United States in 1861, mentioning especially the earnest efforts made by Governor Bragg to arrest civil war, and to find a peaceful solution of our unhappy political troubles in the Peace Congress of the Central States then held at Washington City.

Judge Battle moved that the Attorney General be requested to present the resolutions adopted by the meeting to the Supreme Court, and Mr. Solicitor Cox to present them to the Superior Court of Wake county, and ask that they be spread upon the minutes of their respective Courts.

The meeting then adjourned *sine die*.

R. M. PEARSON, CHAIRMAN.

D. M. CARTER, Secretary.

In the Supreme Court, Wednesday, January 24th, 1872, the following proceedings were had, to-wit:

Attorney General Shipp presented the preamble and resolutions adopted at a meeting of the members of the Bar, on the 23rd inst., commemorative of the late Thomas Bragg, and asked, in the name of said meeting, that the resolutions be spread upon the records of the Supreme Court.

Chief Justice Pearson said:

"The resolutions are concurred in by the Court. It is ordered that the resolutions be put on record. The Reporter will enter the proceedings in an appendix to the next number of the Reports.

"The memory of Thomas Bragg, as an able, upright, diligent and virtuous member of its Bar, will be cherished by the Court."

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ACCORD AND SATISFACTION:

1. The principle is too well established and too long acquiesced in to be disturbed, that an agreement by a creditor to receive a part in discharge of the whole of a debt due to him by a single bill, is without consideration and therefore void.
2. To this rule there are exceptions, as if:
   1. A less sum is agreed upon and received before the day of payment.
   2. Or at a different place.
   3. Or money's worth.
   4. Or where a general composition is agreed upon.

   —*McKenzie* v. *Culbreth*, 534.

ACT OF '96:

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1. In actions to recover damages for an injury resulting in death, brought under our act, the correct rule touching the *quantum* of damages is, the reasonable expectation of pecuniary advantage, from the continuance of the life of the deceased.
2. In such actions, evidence of the number of children left by the deceased is inadmissible as irrelevant and calculated to mislead the jury.
3. In such actions it is competent to prove the age, strength, health, skill, industry, habits and character of the deceased, with a view to arrive at his pecuniary worth to his family. *Kesler* v. *Smith*, 154.

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ADMINISTRATORS AND EXECUTORS:

1. After a judgment fixing an executor with assets, and a return of an execution issued thereon, *nulla bona*, the proper mode to subject such executor personally, is by motion founded on notice and not by civil action.

2. Writs of *scire facias* consisted of two classes, the object of the first class being to remedy defects in, or to continue an action; that of the second class, to commence some proceeding.

3. Proceedings in the nature of a *sci. fa.*, of the first class, are almost indispensable in the administration of justice, and the object of the Code was merely to abolish the name and form of writs of this class, and simplify the process into a notice or summons, to show cause why further proceedings should not be had to provide further relief, in matters where parties had had a day in Court, &c., and not to effect the substance of the remedy.

4. On such motion, the Judge may allow the defendant to make any defence which he could have availed himself of, under the old *scire facias* proceeding.

5. The form of pleading and practice to be pursued in order to subject executors and administrators personally, under the former system, elucidated by DICK, J. *McDowell* v. *Asbury*, 444.

6. When a father is indebted to his children, and gives them property or money at their maturity or marriage, the presumption is that this is a payment of the debt and not an advancement. This presumption, however, is liable to be rebutted by the facts in the case.

7. If money is given to a son-in-law, under similar circumstances, or paid by the father-in-law as surety, the same rule applies.

8. If a father, while acting as executor, receives into his possession a number of slaves bequeathed to his children, and afterwards sells one of them, and retains and controls the others until their emancipation; *Held*, that in an action for the hire of said slaves, &c., it shall be determined, as a fact, whether he converted, or intended to convert, the slaves to his own use, or whether he held them as trustee or bailee for his children. If the former, a debt is established, and the presumption above referred to applies—otherwise it does not.

9. A trustee is generally entitled to commissions, but when a person is trustee by reason of his being executor, and voluntarily assumes control of a fund willed to minor children, he not being their guardian, he is not entitled to commissions.

10. A father is bound to support his children, if he has ability to do so, whether they have property or not, and he is not entitled to any credit for such support, in a settlement of accounts between them and himself.

11. In an action for an account against an executor, the personal representative, and not the children, of a deceased legatee, should be made a party. *Haglar* v. *McCombs*, 345.

12. The rights of an administrator, *de bonis non*, relate to the death of the intestate, and he is bound only by such lawful acts of the previous administrator as were done in due course of admistration; for any *devastavit* on the part of the former administrator, the administrator *de bonis non* ought to recover the value of the goods wasted, by an action on the bond of his predecessor; but where the sureties on the bond are insolvent, such action would be unavailing, and, therefore, unnecessary.

13. It is the duty of the administrator, *de bonis non*, to complete the administration of the estate, by collecting the unadministered assets, applying them in payment of debts, and when there are no personal effects, to obtain license to sell the real estate.

14. The sale of real estate by the heirs-at-law, within two years after

the death of the intestate, is void as against the creditors and the administrator. Rev. Code, ch. 46, sec. 61, Acts of 1868-'69, ch. 113, sec. 105. *Badger* v. *Jones*, 305.

15. Where an administrator sold land of his intestate for the payment of debts, and previous to the sale an agreement was made between him and the creditor of the estate, "that if he would buy the land he should have credit on certain claims and notes over which he had control, and which were due from the intestate, to the amount that he (the administrator) could pay *pro rata*;" and the creditor, on the faith of such agreement, bought the land: *Held*, that in an action on the bond given for the purchase money, the defendant had a right to give in evidence the agreement, and was entitled to credit according to its terms: *Held, further*, that such agreement need not be reduced to writing, and that it was not contrary to the policy of the law. *Norton* v. *Edwards*, 367.

16. If a simple contract creditor receives payment of the executor, a bond creditor cannot afterwards, either at law or in equity, compel the simple contract creditor to refund, for both are creditors, and the creditor first paid may, with good conscience, retain the money, and leave the bond creditor to his action as for a *devastavit*

17. Nor is this principle varied by the receipt of property in satisfaction instead of money: *Provided*, the property is taken at a full price, *bona fide*, and, without notice that the executor is contriving to defeat the priority of the bond-creditor.

18. CASE.—The daughter of a decedent being very solicitous to cause his debts to be paid, on being assured by the executor that her own and his (the executor's) debts are the only ones outstanding, buys from the executor certain property, and executes her notes to certain persons, creditors of the executor, and it afterwards appears that the testator owed other persons: *held* that these facts warrant a recission of the transaction.

19. In the case above stated, our Courts having refused to adopt the doctrine of the English Courts, by which a purchaser from a fiduciary is compelled to see to the application of the purchase money—had the purchase money been paid, the purchase would have been protected in her title, but as the purchase money had not been paid, the fund will be arrested and applied in a due course of administration. *Whitted* v. *Nash*, 590.

ADMISSIONS.

See ATTORNEY, 8, 9, 10—Confessions.

ADVERSE POSSESSION.

1. When one in possession of a tract of land, conveys the same in trust for the payment of debts, and afterwards the said land is sold at execution sale, and bought for the benefit of the bargainor's wife, and the said bargainor remains in possession during his lifetime, and the wife continues the same to the bringing of an action of ejectment: *held*, that such possession is not adverse to the trustee, nor to the purchaser at the sale under said deed of trust.

2. Where a deed of trust is made to secure certain specified debts, one of which is tainted with usury, and a purchaser buys at the trustee's sale, for valuable consideration, and without notice of the illegality of the consideration of the said debt: *held*, that his title is not affected thereby.

3. If a deed contains a declaration of trust in favor of several creditors, and one of the debts secured is feigned or usurious, and there

be no combination between the creditors, to whom the true debts are due, and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declaration of trust in favor of the true debts may not stand, and the feigned debt be treated as a nullity. *McNeil* v. *Riddle*, 290.

AMNESTY.

1. After the rehabilition of the State, parties, who had been arrested as recusant conscripts, had a right of action against their captors.
2. But such causes of action have been destroyed by virtue of the Amnesty of Act of 1866.
3. The seizure of the property of a recusant conscript, at the time of his arrest, is a mere incident to the arrest, and the cause of action therefor follows the fate of the principal cause, and, is likewise embraced, by that act.
4. The Amnesty Act, thus understood, is not liable to animadversion, as having the effect to divest "vested right," or otherwise infringe any provision of the Constitution.
5. During the late rebellion, the Confederate States, and the States composing it, were, to all intents and purposes, governments *de facto*, with reference to citizens who continued to reside within the Confederate lines, *hence*, the Constitution of the Confederate States and the acts of its Congress, and the Constitution of the State as then ordained and the acts of its Legislature, constituted, during the continuance of the rebellion, THE LAW OF THE LAND.
6. The scope and effect of the Amnesty Act was to recognize this principle.
7. The Amnesty Act is not only constitutional, but a wise, beneficent and remedial statute, and should be liberally construed, on the maxim *privatum incommodum publico bono pensatur*. *Franklin* v. *Vannoy*, 145.

ANIMALS.

See CRIMINAL ACTION.

ANSWER TO RULE ON ATTORNEY.

See ATTORNEY.

APPEAL.

See CRIMINAL PROCEEDINGS.

APPEALABLE ORDERS.

See ISSUES, SETTLEMENT OF.

APPLICATION OF PURCHASE MONEY.

See ADMINISTRATORS AND EXECUTORS, 19.

ARREST.

See AMNESTY.

AFTER-ACQUIRED INTEREST.

See TRUST ESTATES, 3.

AGREEMENT.

See ACCORD AND SATISFACTION.

AGENCY.

1. If goods are sold to a party, on the representations of one professing

to be his agent, and are afterwards delivered to such party and invoiced to him and the invoice received and the goods are used by him, he is bound for their value, and under such circumstances, it is immaterial whether the person professing to be agent was such or not.

2. In order to avoid such responsibility, the party to whom the goods were sent should have, on the receipt of the invoice, promptly refused to receive—otherwise, silence gives consent under the maxim *qui tacet clamat.*

3. The invoice was notice that the credit was given to such party.

4. In such case it is immaterial that the officers of such party (a corporation) did not intend to induce the seller to believe that the corporation had bought and would pay for the goods, or that they would not have kept the goods if they had not known that the corporation was bound to pay the seller for them.

5. The rule is, that when one, by his conduct, unintentionally gives another resonable ground to believe that a certain state of facts exists, and the other acts on the belief so induced, that he will be damaged if it is not true, the person so inducing is estopped as to the other afterwards to deny the existence of such state of facts.

6. The retention of the goods and silence, after receipt of invoice, furnished reasonable ground to cause the sellers to believe that the corporation ratified the sale and may naturally have prevented them from taking such action as they otherwise would for their security.

7. It was not erroneous, to permit the plaintiffs, on the trial below to testify that such agent informed them before the sale, that he had in his possession a letter, from an officer of the defendant authorizing him to purchase the goods for it—such evidence is not liable to animadversion as evidence to prove the contents of a writing by parol—the evidence not being directed to show that there was a genuine letter, containing such contents, but merely the representations of the agent as to the contents of a letter, *in confirmation of the plaintiff's evidence* that the credit had been given to the corporation and not to the agent. *Miller* v. *The Land and Lumber Company*, 503.

ARTIFICE.

See CRIMINAL ACTIONS.

ASSUMPSIT.

See AGENCY—ACCORD AND SATISFACTION.

ATTORNEY, DUTIES AND LIABILITIES OF.

1. An answer to a rule on an attorney of the Court to show cause why, under pain of contempt, he should not pay into Court a sum of money received by him for a client, which admits the receipt and non-payment, but denies any application of it to his own use; which avers its loss, but, in consequence of long continued drunkenness, respondent could not tell how; suggesting as a supposition, that respondent had burnt it or put it away in some secret place to prevent his destruction of it; and avowing an inability to find it, after diligent search: *Held*, to be insufficient, and to authorize a further rule on respondent to pay the money into Court, or show cause why he should not be attached.

2. But a return to such second rule, which avows, that after making every effort to comply with the rule, it is out of respondent's power to do so; that he is wholly insolvent, and has nothing wherewith to

support himself and family, could obtain no aid from his friends and relations, and has no credit; and that in failing to perform the order, he intended no contempt of the Court, and deeply regretted his inability to do justice to his client: *Held*, to be sufficient, and entitled the respondent to be relieved from arrest and imprisonment, because the Court was satisfied that it was not in his power to pay the money into Court.

3. If a party is ordered to execute a deed, and refuses to do it, he will be kept in jail until he does do it, for that is a thing which he can do. So, if an attorney, by false representations, procures his client, for an inadequate consideration, to assign the cause of action, he will be imprisoned until he shall execute a release and re-assignment; but when a man is ordered to pay money into Court, and swears that, after every effort, it is out of his power to pay any part of it, (in the absence of any suggestion to the contrary), that is an end of the proceeding; for the Court will not require an impossibility, or imprison a man perpetually for debt, he having purged himself of the contempt.

4. In such a case, on a rule against the attorney to show cause why his name should not be stricken from the roll, this Court, prior to the act of the General Assembly, ratified April 4th, 1871, possessed the power to make such rule absolute, and would have felt it their duty to have taken that course.

5. By the proper construction of that act, this Court is shorn of its power to disrobe an attorney, except in a single instance, where he has been *imdicted* for some criminal offence, showing him to be unfit to be trusted in the discharge of the duties of his profession, and upon such indictment has either been *convicted* or *pleaded guilty*.

6. The Act of 1871 fails to provide any power to be used in the stead of the former power of the Court, and so is a disabling and not an enabling statute.

7. The words "convicted, or in open Court confessed himself guilty of some criminal offence," used in this Act, have acquired a technical meaning, and must be construed to convey the idea that the party has been convicted by a jury, or has in open Court, when charged upon an indictment, declined to take issue by the plea of not guilty, and confessed himself guilty.

8. The admission of an attorney, made in an answer to a rule to show cause why he should not be attached for contempt in failing to pay money into Court, which he wrongfully withholds, is not such a "confession in open Court," and is contemplated by the Act.

9. Such admission cannot be considered technically as a confession, because it is not voluntary as when one is charged on an indictment, and confesses his guilt in open Court, but the respondent was compellable under heavy pains and penalties, to answer under oath.

10. To allow his answer to be used as a confession to establish guilt, would be objectionable as a means to compel him to *criminate himself on oath*, and for such an inquisitorial proceeding, there is no precedent in the Courts of any country which enjoys the rights guaranteed by MAGNA CHARTA.

11. The wrongful retention of a client's money by an attorney, was, before the passage of the late Act, not a *direct*, but a *constructive* contempt, made so by the common law, to enable the Court to purge the Bar of unworthy members.

12. Whether this Court possesses the power to punish under the circumstances, by virtue of section 2, chapter 177, Acts of 1868–'69, for

misbehavior as an attorney in his official character under paragraph 8, sec. 1, discussed, but no definite conclusion arrived at.

13. But, if it were clear that this Court has full power to punish, by fine and imprisonment, for a *constructive consequential* contempt, it might be questioned whether this Court, which was not created for the punishment of criminal offenses, should, on mere motion, inflict such punishment, while the proceeding to disbar is suspended to await further preliminary steps, should any be taken, in the Superior Court.

14. Fine and imprisonment is not the *appropriate* remedy to be applied to an attorney, who by reason of moral delinquency or other cause, has shown himself to be an unworthy member of the profession. *Kane* v. *Haywood*, 1.

BANKRUPTCY:

1. The District Courts of the United States have general original jurisdiction in all matters appertaining to the estate of a bankrupt; and they may exercise extra *territorial jurisdiction*, in collecting the estate and adjusting the claims of the creditors of the bankrupt, when the Courts of Bankruptcy can fairly and fully determine the rights of the parties interested.

2. In all matters of controversy, when the subjects in dispute are of a local character, the rights of the parties must be determined in the *local* Courts.

3. When a mortgagee, by the terms of the mortgage, has a right to foreclose, when an adjudication in Bankruptcy is made, this right cannot be administered by a District Court, sitting as a Court of Bankruptcy in another State. The State Courts can afford a remedy by foreclosure or sale, and at the same time allow the assignee to have the full benefit of the equity of redemption. *Whitridge* v. *Taylor*, 273.

4. When an execution for costs, incurred in this Court, has been returned unsatisfied, and the party is insolvent and entitled to moneys, in the Clerk's office of this Court, this Court will order that the office-costs be deducted from the moneys so due to him.

5. Although such execution debtor is adjudicated a bankrupt, it will not affect this conclusion, as the assignee *quoad hoc* takes, subject to all the *equities* of the bankrupt.

6. The position and and legal *status* of an assignee, discussed and explained by RODMAN, J. *Clerk's Office* v. *Bank*, 214.

BARGAINOR AND BARGAINEE, HOW FAR ESTOPPED:

See TENANTS AND TENANCY—TRUST ESTATES.

BASTARDY:

1. It is not the sole purpose of the Act, relative to "Bastard Children," Rev. Code, chap. 12, to require the putative father to indemnify the County, but likewise to maintain the child.

2. As to past maintenance, there is no difference between that and future maintenance, so far as the power of the Court is concerned.

3. When a person was charged with being the father of a bastard child, and gave bond for his appearance at the next term of the Court, and before the term of the Court, the child died: *Held*, that it was error in the Court to discharge such putative father upon payment of costs, and without making an order requiring him to give bond. What kind of order, should be made in such cases, is in the discre-

tion of the Court. The statute seems to require *some order* in every case. *State* v. *Beatty*, 648.

BEQUEST:
See ADMINISTRATORS AND EXECUTORS.

BLOOD OF FIRST PURCHASER:
See COLLATERAL DESCENTS.

BONA FIDES:
See ESTOPPEL.

BONDS:
See ILLEGAL CONSIDERATION.

BOND AND SIMPLE CONTRACT CREDITORS:
See ADMINISTRATORS AND EXECUTORS, 16, 17, 18.

CANONS:
See COLLATERAL DESCENTS.

CAPACITY, TESTAMENTARY:
See MENTAL CAPACITY.

CARRIERS OF GOODS:

1. When goods are shipped to a consignee, over a railway, the shipper cannot, by notice to the carrier, compel him to stop the goods at an intermediate point.
2. Whether an agent of such carrier may not bind his principal by an express contract to hold the goods, *quere*; but such contract must, at least, be an express one.
3. Where tobacco was shipped from Thomasville *via* Charlotte, and consigned to a party in Columbia, and was sent off from Charlotte, by rail to Columbia, according to the bill of lading, and the tobacco was received by the consignee in Columbia, but no express contract to hold at Charlotte was shown, the measure of the shipper's damages is the cost to send it back, or what it would have cost to send it back, and compensation for the delay.
4. The receipt of the tobacco by the consignee, and having it stored, was not a waiver of the liability of the defendant, for sending it without orders, for the plaintiffs were not obliged to give up their tobacco by refusing to receive it at Columbia, and charge the whole value to the defendant, nor were they obliged to send it back and charge the defendant with the expense and delay; they had their election to receive the tobacco, keep it in Columbia and charge the defendant with what it would have cost to put the tobacco back in the place from which it was wrongfully sent.
5. The shipment of tobacco from Charlotte to Columbia, on the 4th day of February, 1865, cannot be deemed the proximate cause of its loss, by the burning of Columbia by Gen. Sherman, on the 17th of the same month. *Pinnix* v. *C. & S. C. R. R. Co.*, 34.

CARRIERS OF PASSENGERS:

1. The policy of the law requires common carriers to use a high degree of care, in transporting passengers, to guard against probable injury.
2. It is their duty to transport and place their passengers safely at the point of destination, and if injury to the passenger ensues from a failure to observe due care, the carrier is *prima facie* responsible.

3. Where a passenger jumped off of a railroad train, while running at a speed of from two to four miles an hour, and this was the proximate cause of the injury complained of, and contributory negligence is alleged, the true criterion of the care required from the passenger is that degree which may have been reasonably expected from a sensible person in such a situation.

4. A passenger on a railroad train had a right to expect that the carrier had employed a skillful and prudent conductor, who had experience and knowledge in his business sufficient, to correctly advise and direct him as the proper time and manner of alighting from the train.

5. Where, when the usual signal was given for slackening the speed of the train, the conductor went with a passenger and his companion out on the platform to assist them in getting off safely, and such passenger, without any direction from the conductor, voluntarily increased danger by jumping off the train while in motion, the carrier is not responsible for an injury resulting therefrom; but if the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the passenger acted under the instructions of the conductor, then the defence of contributory negligence would be unavailing.

6. Where there was evidence tending to prove that the intestate of the plaintiff informed the conductor that he wished to get off at a certain point, and on approaching the place, the conductor went with him and another upon the platform of a rear car, and the intestate got upon the step of the platform, preparatory to springing off, conductor cautioning him not to "jump off yet," and when a few moments after, the conductor said, "now is your time—jump," and thereupon he jumped off and on to a platform, fell down and rolled under the train and was killed; the train at the time going much slower by degrees than before the brakes were blown on, the other passenger alighting immediately after the intestate, running along with the train, rather than jumping off at right angles, that he was not able to "take up" for several yards; that intestate, when he jumped off, had, under his left arm, a stencil-plate about the size of an ordinary barrel head, between two pieces of very thin plank; also a satchel of sufficient capacity to hold two quarts, to which were attached light leather straps, passing around his shoulders, and that intestate also had a book, in size ten inches by five, and plaintiff requested the following instructions to the jury: "That if the jury should find that the defendant did not stop its train alongside of the place where the intestate desired to alight, and that the conductor, while passing such place (a platform), and when the cars were moving at from two to four miles an hour, directed the intestate to alight, and he obeyed the direction, he was justified in doing so, and his act in law, was not contributory negligence hindering a recovery;" *Held*, that the refusal of the Court to give such instructions was erroneous, and entitled the plaintiff to a *venire de novo*. *Lambeth* v. *N. C. R. R. Co.*, 494.

CASES DOUBTED, EXPLAINED, DISTINGUISHED, &c.

BIGGS, *ex parte*, 309.

BLOUNT *v.* BLOUNT, 224.

BRADSHAW *v.* ELLIS, 100.

BRANDON *v.* ALLISON, 367.

BRANNOCK *v.* BRANNOCK, 290.

BRYAN *v.* WALKER, 145.

CHAPMAN *v.* WACASER, 229.
CREDLE *v.* SWINDELL, 234.
FAGAN *v.* NEWSON, 234.
HORNE *v.* HORNE. 584.
LYTTLE *v.* BIRD, 234.
MCKEITHAN *v.* TERRY, 159.
MASON *v.* MILES, 425.
SAUNDERS *v.* HATTERMAN, 234.
SHELTON *v.* SHELTON, 456.
SHOBER *v.* HAUSER, 290.
STATE *v.* DEAL, 627.
STATE *v.* SHELTON, 627.
WORTHY *v.* BARRETT, 60.

CERTIORARI:

See PRACTICE—CODE.
PRACTICE—CRIMINAL.

CHALLENGE FOR CAUSE:

See CRIMINAL PROCEEDINGS.

CHALLENGE TO JUROR:

1. It is settled, that a witness, who swears to the general bad character of another witness, may, upon cross-examination, be asked to name the individuals who had spoken disparagingly of the witness and what was said. This is every-day practice. There is a difference between an examination in chief and a cross-examination, when the party endeavoing to sustain the witness, whose general character is attacked, may go into particulars as to persons, and what they said.
2. When a witness was called, to impeach the character of another witness, and stated that he did not know the general character of said witness, he ought to have been told to stand aside. Counsel have no right to cross-examine their own witnesses.
3. A challenge to a juror must be made in "apt time," and before the jury are empannelled. If, after a jury have been empannelled and charged, exception is made, it is not in "apt time." After verdict it is a matter of discretion for the judge, whether, under such circumstances, he will grant a new trial. *State* v. *Perkins*, 126.

CHARGE ON LAND:

Where a deed was made by a father to his son, in pursuance of a previous agreement, and contained the following clause, to-wit, "for, and in consideration of $200, and the faithful maintenance of T. L. and wife, P. L., hath given and granted unto the said T. L., a certain tract of land, to have and to hold, &c.," *held*, that this stipulation constitutes a charge upon the land, in the hands of the heir-at-law, though not upon the personal estate in the hands of the administrator. *Laxton* v. *Tilly*. 327.

CIRCUITS, EXCHANGE OF:

See EXCHANGE OF CIRCUITS.

CODE—PLEADING:

1. Where a note was given, and made payable to A, as guardian, and

it was afterwards, in settlement, delivered to the husband of the ward without endorsement: *held*, that a suit upon said note was properly brought in the name of the guardian, to the use of the husband and his wife.

2. A trustee may sue in his own name, or he may join his *cestui que trust;* and the trust, between guardian and ward, may be kept alive after a settlement, if they so choose, without any purpose. *Mebane* v. *Mebane*, 334.

3. The object of the Code was to abolish the different forms of action and the technical and artificial modes of pleading used at common law, but not to dispense with such degree of certainty, regularity and uniformity, as are deemed essential in every system adopted for the administration of justice.

4. The pleadings must contain the same substantial certainty, now, as was formerly requisite in a declaration, &c., and unless the defendant controverts facts alleged, they must be taken as true for the purposes of the action. C. C. P., 127.

5. The word "plead," used in the Act of 1868–'69, chap. 76, sec. 4, must be regarded as an inadvertence, and was not intended to change the Code system.

6. An entry on the docket of "general issue, stat. lim., with leave," is not sufficient pleading, and, in the discretion of the Judge below, would authorize judgment of *nil dicit.*

7. If a complaint is founded upon an assumpsit for goods sold, a final judgment, without proof of value, &c., as upon a default, is erroneous.

8. In such cases the Clerk must ascertain the amount due in the mode prescribed by sec. 217, C. C. P.

9. The entry on the docket was sufficient notice of appearance to entitle the defendant to the five days' notice under the statute. *Oates* v. *Gray*, 442.

10. A demurrer, for want of jurisdiction, can only be sustained where the want of jurisdiction appears upon the face of the complaint.

11. Where a note was given in 1862, there is presumption that it was given for a loan of Confederate money; but that presumption is not conclusive. The facts necessary to authorize the application of the legislative scale are matters of defence, and must be pleaded when the note sued on does not, *prima facie*, show that it is applicable, and, when it does so show, a defendant must in some way claim the application of the scale.

12. A demurrer to the jurisdiction of the Superior Court will not be sustained, where it appears in the complaint that the note sued on was for more than $200, notwithstanding said note may, *prima facie*, be subject to the legislative scale. *Bank of Charlotte* v. *Britton*, 365.

13. The survivor of two joint guardians may sue on a note payable to such guardians, as such, and on his death, *pendente lite*, the suit is properly revived in the name of his personal representative as executor or trustee of an express trust, under sec. 37, C. C. P., notwithstanding that the wards have arrived at full age and the note was assigned by the plaintiff to one of them.

14. Notwithstanding that sec. 80, ch. 113, Acts 1868–'69, be regarded as repealed by subsequent acts, and although it provides "that any executor or administrator, against whom an action is pending in any Court of this State, and who has heretofore entered pleas in such actions, may hereafter, (as a matter of right, and without costs,)

amend, strike out, or change such pleas at his discretion;" yet the provision does not contemplate the exercise of such privilege at any indefinite period, but an application thereunder must be made within a reasonable time.

15. A delay until the fourth Court, after the passage of the Act, is unreasonable and works a forfeiture of the right, and the granting of such motion is wholly in the discretion of the Court below.

16. Whether interest on a guardian note can be compounded after his death, *quere;* but such difficulty may be obviated by a remission of the interest alleged to be in excess, even in this Court. *Biggs* v. *Williams*, 427.

17. If the defences set up in an answer are worthy of consideration, they cannot be deemed frivolous.

18. In such case the plaintiff should reply or demur, and if the demurrer be overruled, it becomes the duty of the Judge to allow him to plead over, unless it is manifest that such demurrer is frivolous, does not raise any question of law worthy of serious consideration, and is interposed merely for delay.

19. The spirit and intent of the Code is, that actions shall be tried as speedily and cheaply as possible, and upon their merits.

20. An answer to a complaint on a covenant for the payment of money, executed by the defendants, and alleged to have become the property of the plaintiff by successive assignments, which alleges that there was a condition, under written said covenant, to make it void if the land for which the covenant was given was subject to incumbrances, and that at the time of the execution of the same, said land was subject to the lien of an execution against the covenantee, and, further, that the assignment of the covenant from the covenantee was procured by duress and fraud, and while the covenantee was mentally incapacitated to contract, and that the plaintiff took his assignment with full knowledge of these facts, and that afterwards the defendant had, after a full account with the covenantee, procured his release of the cause of action: *Held*, that such defences are not frivolous, but are worthy of serious consideration. *Swepson* v. *Harvey*, 436.

CODE PRACTICE:

See PRACTICE—CODE.

COGNIZOR, LIABILITY OF:

See CRIMINAL PROCEEDINGS, 1.

CODE C. P. CONSTRUED:

Sec. 215. SKINNER v. MAXWELL, 45.

Secs. 244, 266. MCKEITHAN v. WALKER, 95.

Sec. 128. GIBBS v. FULLER. 116.

Secs. 366, 368, 369, 392. HOWERTON v. TATE, 231.
MOTT v. TATE, 231. n.

Sec. 131. WALSH v. HALL, 233.

Sec. 397. STATE v. ADAIR, 298.

Sec. 508. FLONBERGER v. LER, 333.

Secs. 55, 57. MEBANE v. MEBANE, 334.
Sec. 217. PARKER v. HOUSE, 374.
Sec. 503. LEDBETTER v. OSBORNE, 379.
Sec. 224. ANDREWS v. PRITCHETT, 387.
Sec. 133. CLEGG v. N. Y. W. S. S. Co., 391.
Secs. 133, 301. KIRKMAN v. DIXON, 406.
Sec. 303. WEBER v. TAYLOR, 412.
Title IX, Chap. IV. TOMS v. WARSON, 417.
Sec. 403. GREEN v. MOORE, 425.
Sec. 37. BIGGS v. WILLIAMS, 427.
Secs. 63, 249. GUDGER v. BAIRD, 438.
Secs. 93, 127, 133, 217. MCDOWELL v. ASBURY. 444.
Sec. 192. MCKESSON v. HENNESSEE, 473.
Sec. 61. ISLER v. FOY, 547.

COLLATERAL DESCENT:

1. It is well settled that in descended estates, where the person last seized dies without leaving issue, or brother or sister of the blood of the first purchaser, but a half-sister not of such blood, and remote collaterals of such blood, the inheritance shall descend upon such remote collaterals, rather upon such half-sister. *Dozier* v. *Grandy*, 484.
2. When lands descend to collateral relations, under the Act of 1868, (Rev. Code, ch. 38, sec. 1, rule 4) the collateral relations of equal degree take *per stirpes* and not *per capita*. *Cromartie* v. *Kemp*, 282.

COMITY:

See CONFLICT OF JURISDICTION.

COMMISSIONS:

See ADMINISTRATORS AND EXECUTORS.

COMMON SCHOOL REGISTERS:

See EVIDENCE.

COMMON CARRIER:

See CARRIERS.

COMPENSATION:

See EXPERT, pay of, &c.
JURORS, pay of, &c.

COMPOUND INTEREST:

See CODE PLEADING.

COMPUTATION OF TIME:

See CRIMINAL PROCEEDINGS, 6, 8.

CONDITIONS PRECEDENT, DEPENDENT, &c.:

1. An action on a note payable "six months after a ratification of a treaty of peace between the United States and the Confederate States" is premature and cannot be sustained.
2. The event constitutes a condition precedent which has not and will not be performed. *McNinch* v. *Ramsay*, 229.

3. The stipuations contained in a contract in these words, viz.: "A B contracts with C D to furnish, at Long Creek Furnace, from 500 to 1,000 bushels of coal daily at 6½ cents per bushel, to be measured at the pit, C D to furnish the timber gratis wherever he may see fit, reserving groves and fruit trees, and advance to A B all the money, weekly, necessary to pay off the wood-choppers—coal to be paid for on delivery at the furnace," are dependent, and if, without fault on the part of the owner of the furnace, and without legal excuse, the other fails to deliver the quantity of coal agreed to be delivered, the owner of the furnace being sued for the value of coal, &c., furnished, may properly set up such failure by way of counter-claim. *Burton* v. *Wilkes*, 604.

See LICENSE.

CONFEDERATE MONEY:

See WILLS, construction of.

CONFEDERATE TRANSACTIONS:

1. Where the defendants in an action of debt upon a promisory note, given in 1862, proposed to prove that the consideration of the note was Confederate money, and that fact was admitted by the plaintiff in the action; *Held*, that such evidence was immaterial.

2. Under the ordinance of 1865, and the act of 1866-'67, a party to an action has a right to show that the consideration of the note sued on was property, and the value of the property; and when money was borrowed, to rebut the presumption of the law, by proving that it was not to be paid in Confederate currency, but in some other money or article.

3. Evidence cannot be introduced to contradict or vary a written contract, except in the cases authorized by the Act of 1866-'67. The general rule of evidence in reference to such contracts, being still in force, with the exceptions stated.

4. In an action which was commenced before the C. C. P., a defendant cannot claim, by way of set-off or *recoupement*, unliquidated damages arising out of an executory contract. *Terrell* v. *Walker*, 244.

5. CASE: A Clerk and Master who executed bonds as such in 1860-'64-'66, and collected in May, 1862, a well secured note, in Confederate currency, where he was directed only to collect the annual interest due thereon, and invested the proceeds in 7-30 Confederate bonds; *Held*, that the bond of the defendant, given in 1869, was not liable for the *laches* of defendant in May, 1862. *Ward* v. *Hassell*, 389.

See CODE-PLEADING, 11.

CONFESSIONS:

1. The confessions of a prisoner ought to be received with great caution, and unless they are free and voluntary, and without fear produced by threats, or inducement of temporal advantage, ought to be rejected.

2. The examination of a prisoner as to his own guilt, taken before a committing magistrate, is not admissible in evidence, as the statement is made under the constraint of an oath, and therefore, not voluntary. The objection to the admissibility of such evidence, is much stronger, if the prisoner be under arrest.

3. To authorize the introduction of parol evidence as to confessions of a prisoner, taken before an examining magistrate, it must appear affirmatively that there was no examination recorded as required by law.

4. Under the Act of 1868-'69, ch. 178, the prisoner is entitled to the benefit of counsel, and, before his examination it is the duty of the magistrate to inform him of the charge against him, and "that he is at liberty to refuse to answer any question that may be put to him, and that his refusal shall not be used to his prejudice." Such examinations are judicial confessions, and the policy of the law requires them to be taken under the protecting caution and oversight of the judicial officer—this caution is an essential part of the proceedings and must be given to a prisoner under arrest, to render his examination, admissible in evidence.

5. The reason of the statute extends to an inquisition by a coroner. In this respect, he is an examining magistrate.

6. When a prisoner is brought before a coroner while he is holding an inquisition, and after witnesses had been examined, a *post mortem* examination made, and a verdict entered up, in answer to a question asked by the foreman of the jury "confessed," *held*, that although after the first question was put, the prisoner was cautioned by the coroner not to answer, the caution came too late to afford the protection which the law requires, and the confession was inadmissible.

7. When a physician was examined as a witness, and stated that he had examined the prisoner, and was of opinion that she had been delivered of a child within three or four days, and it was proposed to ask him "whether, from his experience and knowledge of females, in three or four days after the delivery of a child, and under the circumstances detailed by the evidence, the prisoner was in a frame of mind to give an intelligent answer, or know what she was talking about?" *held*, that the question was proper, and should have been allowed.

8. The rule of law in criminal cases, requiring proof beyond a reasonable doubt, does not require the State, even in a case of circumstantial testimony, to prove such a coincidence of circumstances as excludes every hypothesis except the guilt of the prisoner. The true rule is, that the circumstances and evidence must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis. *State* v. *Matthews*, 106.

9. The admissions of guilt of one who had, prior to making such admissions, been induced by fear or the hope of benefit, to confess himself guilty of a criminal charge, cannot be used against him, unless it be shown by the most irrefragable evidence, that the motives which induced the first confession had ceased to operate.

10. Hence, when a party had been persuaded to make a confession of guilt, through a promise of immunity from prosecution therefor; *held*, that in the absence of clear proof that such inducement has ceased to operate, his confessions touching the same offence, thereafter made, were inadmissible. *State* v. *Lowhorne*, 638.

11. The words "convicted, or in open Court confessed himself guilty of some criminal offence," used in this Act, have acquired a technical meaning, and must be construed to convey the idea that the party has been convicted by a jury, or has in open Court, when charged upon an indictment, declined to take issue by the plea of not guilty, and confessed himself guilty.

12. The admission of an attorney, made in an answer to a rule to show cause why he should not be attached for contempt in failing to pay money into Court, which he wrongfully withholds, is not such a "confession in open Court," as is contemplated by the Act of April 8, 1871.

13. Such admission cannot be considered technically as a confession, because it is not voluntary, as when one is charged on an indictment, and confesses his guilt in open Court, but, the respondent was compellable under heavy pains and penalties, to answer under oath.

14. To allow his answer to be used as a confession to establish guilt, would be objectionable as a mean to compel to *criminate himself on oath*, and for such an inquisitorial proceeding there is no precedent in the Courts of any country which enjoys the rights guaranteed by MAGNA CARTA. *Kane* v. *Haywood*, 1.

See EVIDENCE.

CONFLICT OF JURISDICTION:

1. The Circuit Court of the United States, is not, in any sense, a foreign Court: its judgments and process bind *proprio vigore*, and create legal rights, which the State Courts are bound to recognize, and, will enforce when the estate or property, subject to the right, comes within their control.

2. Executions issued from the United States Courts create a lien from their *teste*.

3. Where a judgment was obtained, in the Circuit Court of the United States, and execution was issued thereon and levied upon the land of the defendant in said execution, and when a Sheriff had other executions from the State Courts, against the same party, issued upon judgments, some of which were of lien before and others after, the *teste* of the execution from the Circuit Court, and the sheriff had levied upon and sold the land of the defendant; *Held*, that the plaintiffs in the execution from the United States Court were entitled to the residue of the money in the hands of the Sheriff after satisfying the judgments of a *prior lien* to theirs, and that upon a rule in the Superior Court, the Judge should have ordered the application accordingly. *Coughlan* v. *White*, 102.

CONSIDERATION:

See ILLEGAL CONSIDERATION.

CONSTITUTION CONSTRUED:

ART. X. (HOMESTEAD.)
Horton v. McCall, 159.
Ladd v. Adams, 164.
Johnson v. Cross, 167.
Watts v. Leggett, 197.
Dellinger v. Tweed, 206.
Burns v. Harris, 509.

ART. IV., SEC. 14. (EXCHANGE OF CIRCUITS.)
Howes v. Mauney, 218.

ART. IV., SEC., 12. (DURATION OF A COURT.)
State v. Adair, 298.

ART. IV., SEC. 10. (SUPERVISORY POWER.)
State v. Beverly Jefferson, 309.

ART. IV., SEC. 4. (JUDICIAL POWER.)
State v. Pender, 313.

ART. IV., SEC. 25. (PENDING SUITS.)
Green v. Moore, 425.

ART. IV., SEC. 17. (JURISDICTION OF PROBATE COURTS.)
Sprinkle v. Hutchison, 450.

ART. II., SEC. 14. (PASSAGE OF PRIVATE LAWS.)

ART. V., SEC. 1. (TAXATION—EQUATION.)

ART. VIII., SEC. 1. (FORMATION OF CORPORATIONS.)
Appendix, 655.

CONSTITUTIONAL LAW:

1. "The Governor shall nominate, and by and with the advice and consent of a majority of the Senators elect, appoint all officers, whose offices are established by this Constitution, or which shall be created by law, or whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly." Section 10, Article 3, Constitution.

2. The words contained in the above section of the Constitution, "whose appointments are not otherwise provided for," mean provided for by the Constitution, and the words, "no such officer shall be appointed or elected by the General Assembly," are superadded as an express veto upon the power of the General Assembly, whether such office shall be established by the Constitution or be created by an Act of the General Assembly.

3. A public office is an agency for the State, and the person whose duty it is to perform that agency, is a public officer. Nor does it make any difference whether he receives a salary and fees and takes an oath, these being mere incidents and no part of the office itself. Nor is it material whether one act or a series of acts are required to be done.

4. The Act of the General Assembly, passed April 6th, 1871. giving to the President of the Senate and the Speaker of the House of Repreeetatives. the power to appoint "all proxies and directors in all corporations in which the State has an interest," creates a public office and fills the same by appointment of the Legislature. It is, therefore, unconstitutional.

5. The power of the General Assembly to repeal an act, which had been passed since the adoption of the Constitution, and accepted by the railroad company as an amendment to their charter, discussed by PEARSON, C. J. *Clark* v. *Stanley*, 59.

6. The power of the Courts to declare statutes unconstitutional is a high prerogative, and ought to be exercised with great caution; they should "not declare a statute void, unless the nullity and invalidity of the act are in their judgment placed beyond a reasonable doubt; and such reasonable doubt must be solved in favor of legislative action."

7. The Act of the General Assembly of 1866–'67, entitled "An Act relating to debts contracted during the war," and allowing either party to show, on the trial, the consideration of the contract, and requiring the jury, in making up their verdict, to take the same into consideration, is not unconstitutional. *King* v. *W. & W. R. R. Co.*, 277.

8. The Acts of the General Assembly, restoring to married women their common law right of dower, are unstitutional, so far as they apply to marriages contracted prior their passage. *Wesson & Hunting* v. *Johnson*, 189.

See DOWER.

HOMESTEAD.

INDEX.

CONSTITUTIONAL CONSTRUCTION:

1. The power of the Legislature to confer criminal jurisdiction on the Chief Magistrates of towns and cities, stands on a different footing from the power to confer civil jurisdiction.
2. By the 4th section of Article IV, of the Constiution, the judicial power of the State is vested in a Court for the trial of impeachments, a Supreme Court, Superior Courts, and Special Courts. The jurisdiction of Special Courts is defined by section 19 of the same Article.
3. The Act of 1868-'69, chap. 178, and chap. 2, of the particular act, sec. 1, page 432, gives (among other officers enumerated) to Mayors, Superintendents of Police or other chief officers of cities and towns, power "to cause to kept all laws made for the preservation of the public peace," etc., and chap. 3, sec. 1, of the same act, gives them power to issue process for the apprehension of persons charged with any offence, and to execute the powers and duties conferred in this chapter," but no final jurisdiction is given to them by any part of said act.
4. The power thus given to chief officers of towns, etc., can be supported by the authority given the Legislature by the Constitution, to create Special Courts for cities and towns, and it can be no objection to the act in question, that it does not authorize these officers to try persons charged with misdemeanors, but simply to arrest and bind them over. *State* v. *Pender*, 313.
5. The 22d section of Art. IV of the Constitution, which provides "the State shall be divided into twelve districts, for each of which a Judge shall be chosen, who shall hold a Court in each county, at least twice a year, to continue for two weeks," does not by express words, or necessary implication restrict the Legislature from passing an act authorizing a Judge, under certain circumstances, to continue a Court longer than two weeks.

CONSTRUCTION OF STATUTES:

See STATUTES CONSTRUED.

CONSTRUCTION OF WILLS:

See WILLS, construction of.

COSTS:

1. Where a party has a witness summoned in his behalf, and the said witness is in attendance upon the Court, but is neither sworn, tendered or examined: *Held*, that according to the practice in this State, the attendance of said witness should be taxed against the party by whom he was summoned.
2. Where a material witness had been summoned and is not present at the trial, but has theretofore been in attendance, and the question is made in apt time, the party summoning the witness has the right to tax the attendance of such witness against his adversary only in case of satisfactory proof of the materiality of the witness, and that his absence was on account of sickness or other sufficient cause. *Loftis* v. *Raxter*, 340.
3. When an execution for costs, incurred in this Court, has been returned unsatisfied, and the party is insolvent and entitled to moneys in the Clerk's office of this Court; *ordered*, that the office costs be deducted from moneys so due him.
4. Although such execution debtor is adjudicated a bankrupt, it will not affect this conclusion, as the assignee *quoad hoc*, takes subject

to all the equities of the bankrupt. *Clerk's Office* v. *Bank of Cape Fear*, 214.

COUNTER-CLAIM:

1. To an action by an administrator, appointed before 1st July, 1869, on a note executed to himself as administrator, for the purchase of land sold under a license from Court, a judgment *quando*, obtained previously by the purchaser against such administrator, is inadmissible as a defence, either by way of set-off or counter-claim.
2. Whether such would be the case if there were no other debts against the estate, and the defendant was certainly entitled to have the assets applied to his claim, *quere*. *Brandon* v. *Allison*, 532.
3. In an action which was commenced before the C. C. P., a defendant cannot claim by way of set-off or *recoupement* unliquidated damages arising out of an executory contract. *Terrell* v. *Walker*, 244.
4. The stipulations contained in a contract in these words, viz.: A. B. contracts with C. D. to furnish, at Long Creek furnace, from 500 to 1,000 bushels of coal daily at 6½ cents per bushel, to be measured at the pit: C. D. to furnish the timber gratis wherever he may see fit, reserving groves and fruit trees, and to advance to A. B. all the money, weekly, necessary to pay off the wood-choppers—coal to be paid for on delivery at the furnace," are dependant, and if, without fault on the part of the owner of the furnace, and without legal excuse, the other fails to deliver the quantity of coal agreed to be delivered, the owner of the furnace being sued for the value of coal, &c., furnished, may properly set up such failure by way of counter-claim. *Burton* v. *Wilkes*, 604.

COUNTY BONDS. (Chatham.)

1. Whether the General Assembly possesses the power to forbid the Board of Commissioners of a county to levy and collect a tax to pay an existing debt of the county, when such Board is commanded to do so by the order of a Superior Court having jurisdiction of the matter, and whether in such case the Board must take the responsibility of deciding this question, so that, should the statute be held constitutional, the return would be responsive and sufficient—otherwise the persons composing the Board subject themselves to fine and imprisonment for contempt, *quere*.
2. The statute, however, of 1871, Acts of 1870-'71, chap. 114, forbidding the Board of Commissioners of Chatham County from levying or collecting any other tax except for the accruing current expenses of the County, is relieved from the imputation of being unconstitutional, for while forbidding the levying of the tax, the scope and effect of it is to empower the Board to raise the necessary amount to discharge the liabilities of the County, outstanding at the time of the ratification of the act, by issuing and selling in the market coupon bonds, and a mandamus lies to compel the issuing and sale thereof to pay debts outstanding when the act was passed.
3. The general rule is, that no return to a peremptory mandamus is sufficient except that it has been obeyed, but if a statute be enacted, after such peremptory order, forbidding obedience and making obedience impossible, such new matter will, of necessity, constitute a sufficient return, provided the statute is constitutional and within the law-making power.
4. Per PEARSON, C. J., *arguendo:* If the only proper construction of the statute is that the creditors of the county are put to the alternative of accepting coupon bonds, or be without remedy because the

Board are forbidden to levy or collect any tax except for accruing current expenses of the County, thus making a direct conflict of power between the Judge of the Superior Court and General Assembly, as assumed by the counsel for each party, there would be much force in the objection that it impairs the obligation of contracts.

5. But this construction is too narrow, and the one first indicated is the true one, not only as warranted by the terms of the Act, but by the well settled principle governing the construction of statutes, namely, that where a statute admits of two constructions, one of which is consistent with the Constitution, and the other is questionable as violative of good faith and as tending to impair the obligation of contracts—in other words, if a thing may be done in a rightful way, or in a wrongful way, it shall be presumed to have been done in the rightful way.

6. In this case, on the coming in of the return, setting forth the provisions of the statute under consideration, the Court below should have modified the order, so as to require the Board to raise money in the mode provided, for the Act being constitutional protected the Board from the charge of contempt.

7. Ordinarily the successful party is entitled to costs of this Court, but they are refused in this case for peculiar reasons. *Sedberry* v. *Commissioners of Chatham*, 486.

CONTEMPT:

See ATTORNEY, *passim.*

CONTRACT:

See ILLEGAL CONSIDERATION.
CONDITIONS PRECEDENT.
LICENSE.

CONTRIBUTION BETWEEN LEGATEES:

See WILLS, construction of.

CONTRIBUTORY NEGLIGENCE:

See CARRIERS OF PASSENGERS.

CONVICT:

See EXPENSES OF CONVEYING CONVICTS.

CONVICTION:

See ATTORNEY.

CREDIBILITY:

See CRIMINAL PROCEEDINGS.

CREDITOR AND DEBTOR:

See ACCORD AND SATISFACTION.

CREDITOR AND SURETY:

See SURETY.

CRIMINAL PROCEEDINGS:

1. When a defendant in an indictment entered into a recognizance for his appearance at a term of the Superior Court, and he appeared at said term and the cause was continued, but he was required to enter into bond for his appearance at the succeeding term, which he failed to do, and departed without leave of the Court: *Held*, that he

might be called out, on a subsequent day of the term, and the failure noted upon the record.

2. In such cases it is not regular to enter a judgment *nisi*. "A recognizance is a debt of record, and the object of a *scire facias* is to notify the cognizor to show cause wherefore the cognizee should not have the execution of the sum thereby acknowledged. No judgment of forfeiture is required before issuing a *scire facias*. *State* v. *Smith*, 620.

3. Where a State's warrant was issued against several persons, one of whom was not arrested, but went before a Justice of the Peace and entered into a recognizance to appear at a future time, and failed to appear, and the Justice afterwards re-issued said warrant, without any special command endorsed thereon: *Held*, that the person who had entered into the recognizance could not be arrested on said warrant. That the warrant was "*functus officio*," and that the officer acting under it was a trespasser. *State* v. *Queen*, 615.

4. No appeal is allowed on the part of the State, where a general verdict of not guilty has been rendered. *State* v. *Phillips*, 646.

5. When a Judge, in charging a jury, used this language, to-wit: "If her character, (referring to a witness,) is of ordinary respectability, you will take her testimony to be true, unless she is fully and thoroughly contradicted," it is erroneous. It is the province of a jury to pass upon the credibility of a witness, and the weight of testimony, and although the witness may be never so reputable, yet, where there is a conflict of testimony, the Court cannot tell a jury that they must take the testimony to be true. Such a charge is in violation of the Act of 1796.

6. Nor is this error corrected, where the Judge in a subsequent part of the charge uses language, in referring to the same witness, susceptible of two constructions. *State* v. *Parker*, 624.

7. When an assault and battery was committed on the 12th day of March, 1869, and a bill of indictment was sent and *found a true bill* on the 17th day of April, 1871, *held*, that the Statute of Limitations was a bar to the prosecution, notwithstanding a warrant was issued on the 12th day of March, 1871, tried on the 17th day of April, and dismissed at the prosecutor's cost.

8. The law is well settled, that a person born on the first day of the year, will be twenty-one years of age on the last day of the year, and on the earliest moment of that day. For such purposes the law does not regard the fractions of a day. *State* v. *Mason*, 636.

9. Upon the rendition of a verdict of not guilty against a defendant in an indictment, he is entitled to his discharge, nothing more appearing against him.

10. A Judge has no right to set aside a verdict of not guilty, nor to grant a new trial, on the motion of the State.

11. An appeal cannot be taken on the State docket from an interlocutory order or judgment.

12. Where a matter involves the power of the Superior Court and error in its exercise, as where in a capital case a Judge improperly discharges a jury, and refuses to discharge the prisoner; the record of the Court below may be brought up for review by a writ of *certiorari* in the nature of a writ of error. Art. IV, sec. 10, Constitution.

13. In such case the proper course is to ask for a rule to show cause

why the writ should not issue, and as a foundation for the order, the Court will require a petition in due form.

14. In a trial for a capital felony, the Judge, for sufficient cause, may discharge a jury and hold the prisoner for another trial; in which case, it is his duty to find the facts and set them out on the record, that his conclusions upon matters of law, arising upon the facts, may be reviewed by this Court.

15. It is the duty of the Judge to be personally present in Court, and to find, judicially, the facts upon which his conclusions are based. Judicial power cannot be delegated. Where, therefore, a Judge is absent from the Court and telegraphs to the Clerk to discharge a jury, and the Clerk so does: *Held*, to be error, and the prisoner in such case is entitled to his discharge. *State* v. *Jefferson*, 309.

16. In an indictment for a misdemeanor, a defendant has a right to challenge a juror for cause, and this right is not confined to capital cases.

17. Where a defendant proposes to challenge a juror for cause—and the Judge announces generally that such challenges are "unusual," except in capital cases—it is not necessary that the defendant should name the particular juror, nor assign a special cause.

18. The supposed analogy between a cause of challenge and an exception to evidence does not exist. *State* v. *Fulton*, 632.

19. Therefore, sec. 397, C. C. P., which authorizes a Judge. "in case the term of a Court shall expire while a trial for felony, &c., is in progress, to continue the same as long as may be necessary for the purposes of the case," is not unconstitutional.

20. Where a witness, in a case of homicide, stated to another person that she had received several severe wounds, and believed she would die, and desired a neighbor to be sent for; that she wanted to "tell all about it, and who did it;" *Held*, that such statements were competent as confirmatory testimony, and the fact that the witness said she would die would furnish no ground for their exclusion.

21. It is competent for a magistrate to state what a witness swore before him in regard to the homicide, although he afterwards committed the statement to writing. Such statement could only be referred to, to refresh his memory, and was properly treated as a memorandum.

22. Where one of the prisoners in this case was present and heard a conversation between the magistrate and his (prisoner's) father, and saw the confusion of the father when a certain statement was made in regard to the principal State's witness; *Held*, that this fact was admissible as confirmatory testimony.

23. After jurors are sworn, but before they are empannelled, it is competent for the Court to allow a challenge for cause. *State* v. *Adair*, 298.

24. The power of the Legislature to confer criminal jurisdiction on the Chief Magistrates of towns and cities, stands on a different footing from the power to confer civil jurisdiction.

25. By the 4th section of Article IV, of the Constitution, the judicial power of the State is vested in a Court for the trial of impeachments, a Supreme Court, Superior Courts, and Special Courts. The jurisdiction of Special Courts is defined by section 19 of the same Article.

26. The Act of 1868-'69, chap. 178, and chap. 2, of the particular act, sec. 1, page 432, gives (among other officers enumerated) to Mayors, Superintendents of Police, or other chief officers of cities and towns,

power "to cause to be kept all laws made for the preservation of the public peace," &c.; and chap. 3, sec. 1, of the same act, gives them power to issue process for the apprehension of persons charged with any offence, and to execute the powers and duties conferred in this chapter, but no final jurisdiction is given to them by any part of said act.

27. The power thus given to the chief officers of towns, &c., can be supported by the authority given the Legislature by the Constitution, to create Special Courts for cities and towns, and it can be no objection to the act in question, that it does not authorize these officers to try persons charged with misdemeanors, but simply to arrest and bind them over.

28. There is nothing in the Constitution, taken altogether, prohibiting the Legislature from giving to cities and towns the power of selecting and designating their chief officers. *State* v. *Pender*, 313.

CRIMES:

See CRIMINAL ACTION.

CRIMINAL ACTION:

1. The owner of land in an incorporated town may lawfully remove a house from one part of his land to another, notwithstanding that, on petition filed for the purpose, the town authorities have ordered the laying out of a street on that portion of the land to which the house was removed, the street not having been actually laid off and located prior to such removal, and the owner of the land not having notice of the petition.

2. Whether, in such case, land can be taken without just compensation, *quere;* but it certainly cannot be taken to subserve private interests, as when an inhabitant seeks to cause a street to be located on the land of another, because it will facilitate such applicant in the erection of a store to be used for his private benefit. *State* v. *Whitaker*, 630.

3. The turkey is a domestic animal, therefore, when a bill of indictment charges that "A. B., one turkey of value of six pence, of the goods and chattels of C. D., feloniously did steal, take, and carry away;" *Held*, that such indictment is sufficient in law.

4. Distinction between stealing domestic animals and animals *ferœ naturæ*, stated by BOYDEN, J. *State* v. *Turner*, 618.

5. The object of the Act of 1865-'66, entitled "An act to prevent wilful trespass an lands," &c., was to keep off intruders, and to subject them to indictment if they invaded the possession after they had been forbidden.

6. A forcible trespass "is a highhanded invasion of the actual possession of another," he being present, the title is not drawn in question. Where a person, who had made an entry, believing a tract of land to be vacant, and had procured a warrant of survey, and under said warrant of survey, had entered upon the land in the possession of another; *Held*, that although the land was not vacant, yet that such person could only be guilty of a civil trespass and not a forcible one, as above defined. *State* v. *Hanks*, 612.

7. Two persons may be charged in the same bill of indictment with retailing contrary to the statute, and one of them may be convicted and the other acquitted.

8. When one contracts to sell a gallon of spirituous liquor, and a portion, viz: less than a quart, is delivered at the time of the contract

of sale, and afterwards the money is paid and three quarts delivered, and *subsequently* the remainder of the gallon; *held*, that this is not a violation of the statute, unless it was an artifice to evade the law, and such intent was a question of fact, which ought to have been submitted to the jury. *State* v. *Simmons*, 622.

9. If one, by trick or contrivance, get possession of the goods of another, and the act be done in such a way as to show a felonious intention to *evade the law*, he is guilty of larceny, as where in addition to other instances, stated in *State* v. *Deal*, 64 N. C., one snatches money from the hands of a man, and immediately escapes to evade the process of law. *State Henderson*, 627.

CURING ERROR IN CHARGE:

See CRIMINAL PROCEEDINGS, 6.
INSURANCE.

DAMAGES:

See INJUNCTION.

DEATH CAUSED BY NEGLIGENCE:

See CARRIERS OF PASSENGERS.

DEATH OF A PARTY TO A RULE:

See SHERIFF.

DEBT:

See ADMINISTRATORS AND EXECUTORS.
ILLEGAL CONLIDERATION.

DE BONIS PROPIIS:

See ADMINISTRATORS AND EXECUTORS.

DECEIT AND FALSE WARRANTY:

See WARRANTY.

DEED, ESTOPPEL BY:

See ESTOPPEL.
TRUST ESTATES.

DEED, OPERATION OF:

1. A deed for land, when registered, has all the force and effect of a feoffment at common law with livery of seizin and a declaration of uses thereon.

2. By the policy of our statutory law, a bastard stands in such relation to his *mother*, that the relationship between them is a sufficient consideration to raise a use, *aliter* as to the *father*.

3. A registered deed from a mother to her bastard child, is valid and conveys the title, either, as having the same operation as a feoffment, with livery accompanied with a declaration of ths use, or, as a covenant to stand seized to uses.

4. Since, as well as before, the statute of uses, 27 Hen., 8, no actual consideration is necessary to raise a use in conveyances operating by transmutation of possession as fine, feoffment, &c., and a deed to lead or declare the uses, was only necessary to prevent a resulting use, arising to the conusor, feoffor, &c.

5. Here, as registration supplies the place of a feoffment with livery, the deed has the effect to lead the uses, and thus rebuts the resulting trust.

6. Whether the question of a lack of consideration is open to any but creditors and purchasers for value, *quere*—per READE, J., it is not. *Ivey* v. *Granberry*, 224.

DEFAULT AND ENQUIRY:

1. A judgment by default for want of an answer, admits that the plaintiff has a good cause of action, and that he is entitled to some damages.
2. In such case, if the plaintiff's claim for damages is certain, or can be rendered certain, by mere computation, there is no need of proof, as the judgment by default admits the claim—but when the measure of damages is uncertain, the assessment must be made upon proof—and the *onus* as to the amount is upon the plaintiff.
3. Therefore, where there was a judgment by default, in a suit on a constable's bond, the plaintiff must prove that the debtors were solvent, and the amount of damage sustained by the constable's not using proper diligence in collecting the claims placed in his hands. *Parker* v. *House*, 374.

DEFECTIVE TITLE:

See INJUNCTION.

DEFENDANT ACQUITTED, EFFECT OF:

See CRIMINAL PROCEEDINGS, 7, 8.

DEMAND:

See MORTGAGE.

DEMURRER:

See CODE–PLEADING, 10, 12, 17, 18.

DESCENDED ESTATES:

See COLLATERAL DESCENTS.

DEVASTAVIT:

See ADMINISTRATORS AND EXECUTORS, 16.

DEPENDANT STIPULATIONS:

See CONDITIONS PRECEDENT.

DEVISE:

See WILLS, construction of.

DILIGENCE:

See FIDUCIARY.

DISBARRING AN ATTORNEY:

1. In a proper case, on a rule against an attorney to show cause why his name should not be striken from the roll, this Court, prior to the Act of the General Assembly, ratified April 4th, 1871, possessed the power to make such rule absolute, and would have felt it their duty to have taken that course.
2. By the proper construction of that Act, this Court is shorn of its power to disrobe an attorney, except in the single instance, where he has been indicted for some criminal offence, showing him to be unfit to be trusted in the discharge of the duties of his profession, and upon such indictment has either been *convicted or pleaded guilty.*

3. The Act of 1871 fails to provide any power to be used in the stead of the former power of the Court, and so, is a disabling, and not an enabling, statute. *Kane* v. *Haywood*, 1.

DISCHARGE:

See CRIMINAL PROCEEDINGS.

DISSENTING OPINIONS:

Dellinger v. Tweed, 206. (PEARSON, C. J., and RODMAN, J.)
Kingsbury v. Flemming, 524. (READE and DICK, J.)
Mason v. Williams, 564. (PEARSON, C. J., and DICK, J.)
Sutton v. Askew, 172. (DICK, J.)
Watts v. Leggett, 197. (RODMAN, J.)

DISTRIBUTION:

See ADMINISTRATORS AND EXECUTORS.

DOCKETING JUDGMENTS:

See PRACTICE–CODE, 25.
JUDGMENT, 2.

DOWER:

1. Previous to the statutes of 1866–'67 and 1868–'69, purporting to restore to married women the common-law right of dower, the wife had only an *inchoate* right of dower, in the lands of her husband, subject to be defeated at any time, by the husband's conveyance.

2. When land was acquired, and a marriage was contracted, previous to the statutes aforesaid, *held*, that these statutes cannot affect the rights of the husband,, nor restrict his power of alienation, nor confer upon the wife any right of dower, which she did not have before.

3. Whether it is competent for the General Assembly to give a married woman a right of dower in land acquired after the passage of the statutes referred to, although the marriage took place before that time, *quere*.

4. An agreement to pay a married woman a certain sum of money for her right of dower in the land of her husband, when the land was acquired, and the marriage was contracted before March 2d, 1867, is void against creditors, for want of consideration.

5. It would seem that before a married woman can set up her consent, as a consideration to support a contract to give her a part of the purchase money for a tract of land, sold by her husband, it ought to appear that she had released her right of dower or covenanted against incumbrances; and, *quere*, whether, in any case, it could depend upon parol evidence, and whether the contract must not be set out in the deed, and appear to be fair and reasonable. *Sutton* v. *Askew*, 172.

6. The Acts of the General Assembly, restoring to married women their common-law right of dower, are unconstitutional, so far as they apply to marriages contracted prior to their passage. *Wesson & Hunting* v. *Johnson*, 189.

7. Where a contract was made for the sale of land, and a bond was given to make title upon the payment of the purchase money, and a portion of the purchase money being unpaid, an action was brought by the vendor against the vendee to sell the lands for payment of the balance due; *Held*, that in such action the wife of the vendee was not a proper party, if the marriage took place prior to March 2d, 1867; *aliter*, if the marriage took place subsequent to that time.

8. The wife of a purchaser, who holds lands under a bond for title, has a contingent right of dower to the extent of the payments made by her husband. *Bunting* v. *Foy*, 192.

9. A claim for dower, under the Act of 1867, set up in 1872, the husband being still alive, cannot be sustained.

10. A demand for dower is a special proceeding, returnable before the Clerk. *Felton* v. *Elliott*, 195.

11. Upon the death of a man seized in fee of land, leaving a widow and minor children, without having had a homestead laid off, the double rights of dower and homestead do not attach together *simul et semel*, either in the widow or widow and children, but dower having been assigned to the widow, the children are only entitled to a homestead *sub modo*, *i. e.*, a present interest, the enjoyment of which is postponed until after the death of the dowress.

12. The manifest purpose of the Act of 1868–'69, chap. 137, is to prevent the widow and minor children from being prejudiced by the omission of one entitled to a homestead, to cause it to be laid off in his life time. It cannot be supposed that the effect of the statute is to go beyond the Constitution, when its professed object is to carry into effect its provisions. *Watts* v. *Leggett*, 197.

DUTY OF CARRIERS:

See CARRIERS OF PASSENGERS.

EASEMENT:

See LICENSE.

EJECTMENT:

See TENANTS AND TENANCY.

ENTITLED TO A DEMAND:

See MORTGAGE.

ENTRIES:

See EVIDENCE, 10, 17.
ESTOPPEL, 4.

EQUALITY:

See WILLS, construction of, 1, 5.

EQUITABLE DEFENCE:

See FRAUD.

EQUITY JURISPRUDENCE:

1. Where one, who stands in the position of a *quasi* mortgagee of land, sells the same to a purchaser with notice of the equity of the *quasi* mortgagor, such purchaser takes subject to such equity.

2. Where one T. handed to B. certain papers which would enable the holder to procure certain tracts of land, receiving from B. certain depreciated currency, with the understanding that he should take out the grants in his own name, and whenever T. paid him $750.94 in greenbacks, B. should convey to T., and B. took out the grants in his own name and sold and conveyed certain of the tracts to G., with notice of his trust to T.; *Held*, that T. had an equity of redemption, and that the purchase money paid by G. to B. should be regarded as paid by T. to B. in redemption; *Held*, *further*, that a purchaser of the land from T., before any of those transactions, is entitled to take the place of T., and succeeds to his equitable rights.

EQUITY:
See PRACTICE IN EQUITY.

EQUITY PRACTICE, (FORMER):
See PRACTICE—SUPREME COURT, 4, 5, 13, 15, 16.

ERROR CURING:
See JUDGE'S CHARGE, 12, 15, 16.
INSURANCE, 5.

ESTATE OF MORTGAGEE AND MORTGAGOR:
See MORTGAGE.

ESTATES, SETTLEMENT OF:
See ADMINISTRATORS AND EXECUTORS.

ESTOPPEL:
1. No estoppel of record is created against one party to the record, even though he had instigated the trespass, on account of which the action was brought, aided in the defence of the action, employed counsel, introduced his deeds in evidence and paid the costs, and though he and the present defendant claimed by deeds under the present trespasser.
2. The principle of estoppel by record, by which an end is put to litigation, and parties and privies are concluded, and cannot be heard to make averment contrary to the finding of a jury, fixed by judgment in regard to a fact precisely put in issue, underlies and is acted upon in all modes of procedure, and while, under our present system, the complaint and answer are usually so diffuse that an issue is seldom joined, with a precision, which is required to work an estoppel; yet, when the complaint avers title in the plaintiff, the answer admits possession, denies the title to the plaintiff, and sets up title in the defendant, a verdict and judgment will conclude the parties and privies in respect to the title as completely as a verdict and judgment in the old action of trespass *quare clausum fregit*, where the only plea was *liberum tenementum*.
3. The action for land under the C. C. P. differs, in this respect, from the old action of ejectment, in which the parties are charged and there is no estoppel because of the generality of the pleading in this: In an action for land the defendant, if he does not intend that his action shall try the title, should merely allege that he is entitled to the possession, and that the defendant withholds it, and so if the defendant does not wish the title concluded by the action, should merely deny the allegations in the complaint so as to make his answer, in effect, a plea of "Not guilty."
4. Entries of ages of pupils, as shown by a common school register, while not admissible to prove the ages, is yet competent as an independent circumstance to corroborate the testimony of a witness as to age. *Falls* v. *Gamble*, 455.
5. One who has, and knows he has title to property, who is present at a sale of it as the property of another, and who, when it is publicly announced before the bidding commences, that all persons claiming the same are requested to make known their claims, remains silent, is estopped afterwards from setting up his title against a purchaser at said sale.
6. One who accepts a deed for property, and claims and acts under it, knows all the facts constituting title, and intends to hold under it

if he can, has such knowledge as the law intends by that term, and every reason applies why it should not be disclosed, which applies in the very rare case of absolute knowledge that the title is good.

7. There is a qualification of the rule to the extent, that the true owner must mean for the purchaser to act upon his representations, but one comes within this qualification even, who, by his conduct, whether it be fraudulent and *malo animo*, or simply negligent and omissive, gives others reasonable ground to believe that he has no claim (for in this connection title and claim are synonymous) to the property, and such others do so believe and act on such belief.

8. Not only the *uberrima fides*, but that simple *bona fides* which the law exacts from every man, required the true owner to make known his claim at said sale, or never; he should have given all bidders the advantages he possessed from his exclusive knowledge; his omission to do so amounted to a negligence which imperilled the interests of others and gave him an unfair advantage over them, enabling him, if he could, to buy low, and thereby secure an indisputable title, or, if another outbid him, to fall back on his reserved claim.

9. The registry of the plaintiff's title did not, *per se*, operate as notice to the purchaser. *Mason* v. *Williams*, 564.

10. One claiming under a deed is not estopped by it, to show that his bargainor did not have title at a time anterior to the delivery of his deed.

11. No estoppel arising from a Sheriff's deed is fed by an after acquired interest—hence, when A had no title to land sold under execution as his property, so that nothing passed at the time by such deed, one who afterwards takes a deed from the defendant in such execution is not estopped to show that in fact his vendor had no title at the date of the execution sale.

12. Neither is such second vendee estopped to show want of title as above stated by any rule of practice; as the rule that, when both parties claim under the same person neither shall be permitted to deny his title, has been adopted for the purpose of aiding the administration of justice by dispensing with the necessity of requiring the proof of original grants and *mesne* conveyances, and after the rule has effected this purpose, it is *functus officio*, and the matter is then open in regard to the title, subject to the doctrine of estoppel, and such other principles as may be applicable. *Frey* v. *Ramsour*, 466.

13. The rule is, that when one, by his conduct, unintentionally gives another reasonable ground to believe that a certain state of facts exists, and the other acts on the belief so induced, that he will be damaged if it is not true, the person so inducing is estopped as to the other afterwards to deny the existence of such state of facts. *Miller* v. *The Land and Lumber Company*, 503.

ESTOPPEL—PRACTICE:

1. The principle that a tenant cannot dispute his landlord's title is in full force, but a tenant was never prevented from showing an equitable title in himself, or any facts which would make it inequitable to use his legal estate to deprive him of the possession.

2. For this purpose, formerly, the tenant was driven into equity, but under the present system, the tenant in such cases can avail himself of such equitable defence by his answer.

3. If such a defence cannot be set up in a Superior Court, it cannot be anywhere, as we have no separate Courts of Equity.

EVIDENCE:

1. Where a note was given in 1863, payable two years after date, and *to be paid in the current funds of the country when due; held*, that the Act of 1866-'67, which raises the presumption that all contracts to pay money, made during the war, were intended to be payable in Confederate money, cannot apply where the writing itself shows a different intent. When the contract is to pay so many *dollars*, evidence may be received to show that the real agreement was to pay in some other money than Confederate currency.
2. When the makers of a note, given for the rent of land, set up as a defence to the action, that the payees in said note had no title to the land and no right to lease the same, and it was replied, that the guardian of the real owners of the land had, since the lease was given, ratified the same by receiving payment, and had entered a *retraxit* in a suit brought against one of the occupants under the lease; *held*, that such replication was sufficient to defeat the defence relied on.
3. The mere fact that there is a paramount title outstanding, or a claim set up against the tenant by the true owner, will not authorize him to dispute the title of his landlord. He must have been compelled to make some payment to the true owner, to avoid an eviction, and such payment is regarded as a payment to the landlord, and to be deducted from the rent.
4. If a note be given for the lease of a tract of land, and it appears that the purpose of the lease was to raise food for laborers employed to make iron for the Confederate Government; *held*, that such a note is not illegal and void on that account; the Courts cannot take into consideration such indirect and remote consequences.
5. Where, in an action upon such note, one of the plaintiffs is introduced as a witness, and it is proposed to ask him whether he did not know the purpose of the lease; *held*, that such question is immaterial, as it could make no difference whether the plaintiffs knew, or did not know, the purpose of the lease. *McKesson* v. *Jones*, 258.
6. Where the defendant gave a receipt to the plaintiff for all the fishing materials, and "apparatus owned by W. & H.," it is competent for plaintiff to show that defendant represented that all of said seine, &c., was at a particular place, as such evidence tends to show where plaintiff was to receive the articles purchased.
7. Where the complaint alleges no fraudulent representation in the sale of personalty, it is proper to charge the jury that plaintiff is not entitled to recover for a fraudulent representation, as there is no such issue raised by the pleadings.
8. It is not error to refuse any instructions asked upon an hypothecation of facts.
9. Where the defendants contracted to sell to the plaintiff all the fishing materials belonging to them, as a firm, and removed a part thereof, the plaintiff is entitled to recover the value of the part thus removed, whether the removal took place before or after the sale. *Wilson* v. *Holley*, 407.
10. It is not competent for a co-debtor to offer in evidence, an entry in writing, of a payment of a debt, made by another co-debtor, who died prior to the institution of a suit, to recover the debt.
11. Such an entry is the simple declaration of the debtor that the claim was paid, which has neither the solemnity of an oath, nor the test of a cross-examination; whether objectionable, also, as made in the debtor interest, *quere*. *Morgan* v. *Hubbard*, 394.

12. If on the trial of the issue of *devastavit vel non*, the will is attacked on the ground of undue influence and false representations, whereby the testatrix as declared in the paper-writing propounded was induced to believe that all of her relatives had joined in proceedings to declare her a lunatic, it is competent for the caveators to introduce the record of such proceedings to show that only a portion of the next of kin had instituted them. *Lawrence* v. *Steel*, 584.

13. Where there are two places upon a railroad for the reception of freight, one called the depot proper, the other a platform a half mile distant from the *depot proper* where heavy and bulky articles were received and deposited for shipment, and there was evidence tending to show that a quantity of cotton, (the subject matter in controversy) had been delivered at the *platform; held*, that under the circumstances of this case, defendants had a right to ask a witness the question, "where was the customary place to deliver cotton to the W., C. and R. R. R. in Charlotte?" and also the question, "where was the railroad depository of cotton;" and that it was erroneous in the Court to exclude such testimony. *Homesly* v. *Elias*, 330.

14. When the proprietor of lands, who, for the purpose of draining the same, shall construct a ditch, drain or canal across a public road, it shall be the duty of the said proprietor to build a bridge over said ditch, canal, &c., and keep the same in repair. Revised Code, ch. 101, sec. 24.

15. Such duty is not incumbent upon the overseer of a public road. Therefore, when a civil action was brought against such overseer to recover damages alleged to have been incurred in consequence of his negligently permitting a bridge over a canal to become unsafe and in bad condition: *Held*, that it was competent for him to show that the canal had been dug across the public road by the proprietor of the land adjacent thereto, and for the purpose of draining the same, and that a bridge had been built over the canal by the proprietor of the land, and had been kept up by him for several years. *Nobles* v. *Langly*, 287.

16. Where the defendants in an action of debt upon a promissory note, given in 1862, proposed to prove that the consideration of the note was Confederate money, and that fact was admitted by the plaintiff in the action: *Held*, that such eveidence was immaterial.

17. Under the ordinance of 1865, and the Act of 166–'67, a party to an action has a right to show that the consideration of the note sued on was property, and the value of the property; and when money was borrowed, to rebut the presumption of law, by proving that it was not to be paid in *Confederate currency*, but in some other money or article.

18. Evidence cannot be introduced to contradict or vary a written contract, except in the cases authorized by the Acts of 1866–'67. The general rule of evidence in reference to such contracts being still in force, with the exceptions stated. *Terrell* v. *Walker*, 244.

19. Where it appears to this Court that the Judge below, has, from the statement of the appellant, the objections of the appellee and his own notes, been enabled to make out a case containing the substantial merits of the controversy, the appeal will not be dismissed, although there was great irregularity in the proceeding below.

20. Nor will the appeal be dismissed, because the statement of the Judge below (Judge Henry), was made out of the District in which the case was tried (9th), unless the record shows that the appellee demanded to be present, and that by reason of his absence, he was

prejudiced, especially when the error consists in the rejection of material and competent evidence.

21. This Court is disposed to extend liberality in matters of appeal-practice, as the profession have not yet become familiar with the new system.

22. If, at a sale of a vested remainder in slaves, a proclamation is made, that if the purchaser did not get the slaves they were not to be paid for, it is competent and relevant, on a trial in an action on the note given by the purchaser, for the vendor to show that his title to such remainder was a good one at the time of the sale by the purchase of outstanding interests, or otherwise, notwithstanding that the *slaves* themselves were emancipated before the life-estate fell in.

23. At such a sale (August, 1861), it is evident that the parties did not contemplate emancipation, nor act or talk with reference to such a result; and this is clearly manifested by the terms of the bill of sale thereat, which embraced the contract between the parties, and which is in these words: "Received of J. O. W., by note, $1,620, his bid for the interest of J. H. W., dec'd, in two negroes, * * * * * * * * * * we warrant the title of said negroes, *as to the interest expressed*, unless recovered from the estate of J. H. W., by M. H. W., who forbid the interests mentioned to be sold, and in case said recovery is made by the said M. H. W., *then* the note of the said J. O. W., shall not be recoverable.

24. If the legal title to such remainder was in the intestate at his death, it passed by the sale to the purchaser, and he is bound for the purchase-money. *Whitesides* v. *Williams*, 141.

25. Upon the trial of an issue involving the value of a jackass, it is competent to prove his reputation. *McMillan* v. *Davis*, 539.

EVIDENCE—CRIMINAL.

1. The confessions of a prisoner ought to be received with great caution, and unless they are free and voluntary, and without fear produced by threats, or inducement of temporal advantage, ought to be rejected.

2. The examination of a prisoner as to his own guilt, taken before a committing magistrate, is not admissible in evidence, when the statement is made under the constraint of an oath, and therefore, not voluntary. The objection to the admissibility of such evidence, is much stronger, if the prisoner be under arrest.

3. To authorize the introduction of parol evidence as to confessions of a prisoner, taken before an examining magistrate, it must appear affirmatively that there was no examination recorded as required by law.

4. Under the Act of 1868-'69, ch. 178, the prisoner is entitled to the benefit of counsel, and before his examination, it is the duty of the magistrate to inform him of the charge against him, and "that he is at liberty to answer any question that may be put to him, and that his refusal shall not be used to his prejudice." Such examinations are judicial professions, and the policy of the law requires them to be taken under the protecting caution and oversight of the judicial officer—this caution is an essential part of the proceedings, and must be given to a prisoner under arrest, to render his examination admissible in evidence.

5. The reason of the statute extends to an inquisition by a coroner. In this respect, he is an examining magistrate.

6. When a prisoner is brought before a coroner, while he is holding an inquisition, and after witnesses had been examined, a *post mortem* examination made, and a verdict entered up, in answer to a question asked by the foreman of the jury, "confessed"; *Held*, that after the first question was put, the prisoner was cautioned by the coroner not to answer, the caution came too late, to afford the protection which the law requires, and the confession was inadmissible.

7. When a physician was examined as a witness, and stated that he had examined the prisoner, and was of opinion that she had been delivered of a child within three or four days, and it was proposed to ask him "whether, from his experience and knowledge of females, in three or four days after the delivery of a child, and under the circumstances detailed by the evldence, the prisoner was in a frame of mind to give an intelligent answer, or know what she was talking about"; *Held*, that the question was proper, and ought to have been allowed. *State* v. *Matthews*, 106.

8. The 12th section of Article IV, of the Constitution, which provides "the State shall be divided into twelve districts, for each of which a Judge shall be chosen, who shall hold a Court in each county, at least twice in each year, to continue for two weeks," does not by express words, or necessary implication, restrict the Legislature from passing an act authorizing a Judge, under certain circumstances, to continue a Court longer than two weeks.

9. Therefore, sec. 397, C. C. P., which authorizes a Judge, "in case the term of the Court shall expire while a trial for felony, etc., is in progress, to continue the same as long as may be necessary for the purpose of the case," is not unconstitutional.

10. Where a witness, in a case of homicide, stated to another person that she received several severe wounds, and believed she would die, and desired a neighbor to be sent for; that she wanted to "tell all about it, and who did it;" *Held*, that such statements were competent as confirmatory testimony, and the fact that the witness said she would die, would furnish no ground for their exclusion.

11. It is competent for a magistrate to state what a witness swore before him in regard to the homicide, although he afterwards committed the statement to writing. Such statement could only be referred to, to refresh his memory, and was properly treated as a memorandum.

12. Where one of the prisoners, in this case, was present and heard a conversation between the magistrate and his (prisoner's) father, and saw the confusion of the father when a certain statement was made in regard to the principal State's witness; *Held*, that this fact was admissible as confirmatory testimony. *State* v. *Adair*, 298.

13. It is settled, that a witness who swears to the general bad character of another witness, may, upon cross-examination, be asked to name the individuals, who had spoken disparagingly of the witness, and what was said. This is every day practice. There is a difference between an examination in chief and a cross-examination, when the party endeavoring to sustain the witness, whose general character is attacked, may go into particulars as to persons, and what they said.

14. When a witness was called, to impeach the character of another witness, and stated that he did not know the general character of said witness, he ought to have been told to stand aside. Counsel have no right to cross-examine their own witnesses. *State* v. *Perkins*, 126.

15. The admissions of the guilt of one who had, prior to making such admissions, been induced, by fear or hope of benefit, to confess himself guilty of a criminal charge, cannot be used against him, unless it be shown by the most irrefragable evidence that the motives which induced the first confession had ceased to operate.
16. Hence, when a party had been persuaded to make a confession of guilt, through a promise of immunity from prosecution therefor; *Held*, that in the absence of clear proof that such inducement had ceased to operate, his confessions touching the same offence, thereafter made, were inadmissible. *State* v. *Lowhorne*, 638.
17. Upon the trial of an indictment for "unlawfully and wilfully demolishing" a public school house, under chap. 24, sec. 103, Revised Code, the record of a petition in equity of several persons who therein claimed title to the *locus in quo*, setting forth their title thereto as tenants in common, the order for partition, the report of the commissioners, and a final decree confirming that report, among whom was a party under whom the defendants claimed, there being evidence of defendant's possession, even if not sufficient evidence of title, is certainly admissible as evidence, tending to explain the possession of the defendants and their *bona fides*. *State* v. *Roseman*, 634.

EXCHANGE OF CIRCUITS:

1. When a Judge exchanges circuits, the instant one of them enters the district the Courts of which first commence, at the same instant the resident Judge of such district becomes Judge of the other, and, in such case it is the duty of the Judge of the district first entered to repair to the other district, so as to reach it at the same time his own is reached by the other Judge.
2. It is erroneous, in an action brought to prevent irreparable injury by sale of land, to try the question of title on affidavits, and therefore, where, from the affidavits on both sides, there is reasonable ground to support the averment of the plaintiff, that the vendors (the defendants) are not able to make good title, an order enjoining a mortgagee, under a mortgage to secure the purchase money, will not be vacated, until the question of title has been tried the usual way. *Howes* v. *Mauney*, 218.

EXPENSE OF CONVEYING CONVICTS:

1. The State is bound, under the Act of 1869–'70, to pay the expenses of conveying convicts to the penitentiary. The Act of 1870–'71, chapter 124, does not repeal the former act in this respect. *Taylor* v. *Adams*, 338.

EXCHANGE OF RAILROAD BONDS:

1. The legal effect of the enchange of bonds by the State and the W. C. & R. R. R. Co., and of the mortgage, authorized by the Acts of 1859 and 1861, was to vest the ownership of the bonds in the State, secured by the mortgage. The State had, therefore, a valuable interest in those bonds and mortgage, as a fund to dispose of, in aid of other works of internal improvement, subject to existing equities.
2. In transferring the bonds to the Western R. R. Co., in payment of the State's subscription, the General Assembly did not exceed its power. But the General Assembly had no power to subordinate these bonds to others authorized to be issued by the Act of March 12th, 1870. *W. C. & R. R. R. Co.* v. *W. R. R. Co.*, 90.

EXECUTION, WHAT MAY BE SOLD UNDER:

1. Where a debtor conveys property in trust to sell and pay certain creditors. the trustee holds in trust for the creditors, and then in trust for the debtor as a resulting trust. This resulting trust cannot be sold under execution, as an equitable estate, for by the provisions of the statute, the purchaser at execution sale takes the legal, as well as equitable estate, which would cut off the creditors.
2. After the debts are paid, the resulting trust is liable to sale under execution. But a mixed trust cannot be sold in that way. *Sprinkle* v. *Martin*, 55.

EXECUTORS AND ADMINISTRATORS:

See ADMINISTRATORS AND EXECUTORS,

EXPRESSION OF OPINION BY JUDGE:

See JUDGES CHARGE, 15, 16.

EXPERT, PAY OF AS WITNESS:

One summoned as an expert in a criminal action, is entitled to extra compensation, under act of 1870–'71, chapter 139, section 133. *State* v. *Dollar*, 626.

FACTS TO BE STATED TO THE JURY:

See JUDGE'S CHARGE, 15, 16.

FALSE WARRANTY:

See WARRANTY.

FENCE:

See INDICTMENT,

FERÆ NATURÆ:

See CRIMINAL ACTION, 3, 4.

FIDUCIARY, DUTY AND LIABILITY OF:

1. A guardian, or other trustee, is bound only to use such care and diligence in keeping the trust fund as a prudent man uses in keeping his own funds.
2. Where money was stolen from an iron safe, where it had been deposited by a guardian as a trust fund, with his own money and valuable papers, and the theft was not discovered for several days, and pursuit was made for the thief in reasonable time; *Held*, that the guardian in such case was not guilty of negligence. *Atkinson* v. *Whitehead*, 296.

FIELD:

See INDICTMENT, 8, 9.

FI. FA.:

See EXECUTION, &c.

FORCIBLE TRESPASS:

See CRIMINAL ACTION, 6.

FORFEITED RECOGNIZANCE:

See CRIMINAL PROCEEDINGS, 2.

FORGERY:

See INDICTMENT, 5.

FRAUD:

1. Where a horse is exchanged for land, and having afterwards returned to the possession of the original owner, the latter is sued for it, the allegation in the answer, that the defendant had agreed to exchange the horse for a tract of land on a certain creek, adjoining his own, and that the plaintiff had falsely and fraudulently asserted title to said tract, and had exhibited a deed to himself for a tract on the same creek, and that the plaintiff well knew that the defendant was only desirous of obtaining title to the particular tract indicated by him, and such was a material inducement to the exchange, would not have been available as a defence under the former system, and but for the wise and beneficent provisions of the C. C. P., the defendant would have been driven to a separate action; but such a statement under the C. C. P., does constitute a good counter claim, within the meaning of the Code.
2. Ordinarily, the maxim of *caveat emptor*, applies equally to sales of real and personal property, and is adhered to in all Courts, where there is no fraud.
3. But if representations, made by one party to a contract, which may be reasonably relied on by the other, constitute a material inducement to the contract, are knowingly false, cause loss to the other party relying on them; and such other party has acted with ordinary prudence, he is entitled to relief in any Court of Justice.
4. If the parties have equal means of information, the rule of *caveat emptor* applies, and an injured party cannot have redress, if he fail to avail himself of those sources of information which he may readily reach, unless prevented by the artifice or contrivance of the other party.
5. So, if the false representation is a mere expression of commendation, or simply a matter of opinion, the parties are considered as standing on an equal footing, and the Courts will not interfere.
6. In contracts of this character, fraud without damage, or damage without fraud, are usually not the subject of an action for deceit.
7. In a case like that set forth in the answer, the purchaser of land is not required, in order to guard against the fraudulent representations of a vendor, to cause a survey to be made; unless some third person is in possession claiming title, or there is some dispute about the boundary or as to the location; or he has received some information which would reasonably induce him to suspect fraud. *Walsh* v. *Hall*, 233.
8. Where a deed of trust is made to secure certain specified debts, one of which is tainted with usury, and a purchaser buys at a trustee's sale for valuable consideration, and without notice of the illegality of the consideration of the said debt; *Held*, that his title is not affected thereby.
9. If a deed contains a declaration of trust in favor of several creditors, and one of the debts secured is feigned or usurious, and there be no combination between the creditors, to whom the true debts are due, and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declaration of trust in favor of the true debts may not stand, and the feigned debt be treated as a nullity. *McNeill* v. *Riddle*, 290.
10. It is well settled that retention of possession by the mader of a deed, forging the name of a witness to a deed and the like, do not, *per se*, render a deed fraudulent, but are circumstances to be weighed and considered by the jury. *Isler* v. *Foy*, 547.

FRAUDULENT CONVEYANCES:
See EQUITY JURISPRUDENCE.

GLANDERS:
See WARRANTY, 1.

GUARDIAN AND WARD:
See FIDUCIARY, &c.

GENERAL VERDICT:
See CRIMINAL PROCEEDINGS, 4.

HANDING PAPER TO JURY:
See JUDGE'S CHARGE, 14.

HIRING SUBSTITUTE:
See ILLEGAL CONSIDERATION, 5, 6, 7.

HOMESTEAD:

1. A homestead and personal property exemption, under Art. X of the Constitution and the laws passed in pursuance thereof, cannot be sold under an execution, issued upon a judgment rendered in an action *ex delicto*. *Dellinger* v. *Tweed*, 206.
2. An execution debtor is entitled to a homestead, as against an execution which bore *teste* before, but was not levied until after the adoption of the Constitution. *Ladd* v. *Adams*, 164.
3. Upon the death of a man seized in fee of land, leaving a widow and minor children, without having had a homestead laid off, the double rights of dower and homestead, do not attach together *simul et semel*, either in the widow or widow and children, but dower having been assigned to the widow, the children are only entitled to a homestead *sub modo*, i. e., a present interest, the enjoyment of which is postponed until after the death of the dowress.
4. The manifest purpose of the Act of 1868–'69, chap. 137, is to prevent the widow and minor children from being prejudiced, by the omission of one entitled to a homestead, to cause it to be laid off in his lifetime. It cannot be supposed that the effect of the statute is to go beyond the Constitution, when its professed object is to carry into effect its provisions. *Watts* v. *Leggett*, 197.

HUSBAND AND WIEE:
See SEPARATE ESTATE.
DOWER.

ILLEGAL CONSIDERATION:

1. Where a promissory note was given by A as principal, and B as surety, the consideration of which was the hiring of a substitute in the Confederate States army, and afterwards the surety, at the request of the principal, paid off said note at its value, and the principal gave his note to the surety for the amount paid: *Held*, that the last contract was a new and independent one, founded upon the consideration of money paid at the request of the principal, and that it was not affected by the illegality of the original note, nor by any knowledge which the surety may have had of that fact. *Powell* v. *Smith*, 401.
2. If a note be given for the lease of a tract of land, and it appears that the purpose of the lease was to raise food for laborers employed to make iron for the Confederate Government: *Held*, that such a

note is not illegal and void on that account; the Courts cannot take into consideration such indirect and remote consequences. *McKesson* v. *Jones*, 258.

3. A note founded upon an illegal consideration, *payable one day after date*, endorsed one day from its date, cannot be recovered on by the endorsee. *Baucom* v. *Smith*, 537.

4. If money be lent to aid in the accomplishment of an illegal purpose, such illegality is not purged by the borrower failing so to apply the money.

5. Hence, where money was borrowed to hire a substitute for the Confederate war service, and the borrower did not hire such substitute, the lender cannot recover on the note given to secure such loan. *Kingsbury* v. *Flemming*, 524.

6. A single bill, given for money borrowed to pay a debt theretofore contracted, by reason of the loan of money to hire a substitute for the Confederate war service, is not tainted with an illegal consideration.

7. The act of an obligor in having previously borrowed money to pay such substitute, though contrary to public policy, had been completed before he borrowed the money from the plaintiff, therefore the single bill, given for the money last borrowed, is a new and independent contract between different parties, in no way including the illegal transaction, and its subsequent connection with the matter is too remote to affect the obligee. *Kingsbury* v. *Suit*, 601.

INDICTMENT:

1. Where time is not the *essence* of the offence, and there is but one statute applicable to the matter, although that statute be recent, or recent and not to take effect until after a specified time, the indictment need not contain an averment that the offence was committed after the statute went into operation.

2. But where there are two statutes in reference to the same offence, and the one of subsequent date changes the nature of the offence, or the punishment of the same, the indictment must, by proper averment, refer to the statute under which it was found, so that the Court may see the exact character of the offence, and the nature and measure of the punishment to be imposed.

3. The 20th sec., 35 chap., Rev. Code, is intended to cure only formal defects in the indictment, after judgment, and not omissions of averments, necessary to enable the Court to give judgment intelligently, and, as in this case, to see whether to proceed under the one statute or the other.

4. Therefore, where, by the Act of 1869, the punishment for arson was confinement in the penitentiary, and by Act of 1871, death, and the offence was committed *after* the last mentioned act, but the time designated in the indictment was before it, and there was no averment in the indictment specifying which of the two acts it was found under, and there was a verdict of guilty, and judgment of death: *Held*, that the judgment must be arrested. *State* v. *Wise*, 620.

5. When an order was forged and drawn, in the name of an overseer and agent, upon his principal, and the purpose was to defraud the principal, the indictment for such forgery must aver that the person whose name was forged was the agent, and that he had authority to draw upon his principal; otherwise, the Court cannot see that the false paper had a tendency to pefraud the principal, or how it could have been issued for such a purpose. *State* v. *Thorn*, 644.

6. Two persons may be charged in the same bill of indictment with retailing contrary to the statute, and one of them convicted and the other acquitted.

7. When one contracts to sell a gallon of spirituous liquor, and a portion, viz., less than a quart, is delivered at the time of the contract of sale, and afterwards the money is paid and three quarts delivered, and *subsequently* the remainder of the gallon; *held*, that this is not a violation of the statute, unless it was an artifice to evade the law, and such intent was a question of fact, which ought to have been submitted to the jury. *State* v. *Simmons*, 622.

8. An indictment under the Act of 1868-'69, ch. 253. concerning the killing, &c.) of stock "in an enclosure not surrounded by a lawful fence," which simply charges the injury, &c., to have been committed on stock in "the field" of one A B, is not certain to that extent required in such pleading, and after a conviction on such indictment, a motion in arrest of judgment will be sustained.

9. Such a defect is not an informality or refinement within the purview of the 14th section of 35th chap. of the Rev. Code, but is a failure to express the charge against the defendant in a plain, intelligible and explicit manner. *State* v. *Staton*, 640.

INFANCY:

1. When an infant purchases a stock of goods, for the purposes of trade and merchandise, and to secure the purchase money executed a note and mortgage of the stock of goods, such contract is voidable and may be disaffirmed by such infant by any act which manifests such a purpose.

2. The effect of such disaffirmance is to restore the property, which remains to the person from whom it was obtained. *Skinner* v. *Maxwell*, 45.

INFORMALITY:

See INDICTMENT, 8, 9.

INJUNCTION:

1. CASE:—A railway company having a right, by virtue of its charter, to locate its road-bed on a certain portion of the land of B, he proposes by letter, that if the company will refrain from such location, it may locate it over another portion of his land, *Provided* it would open, grade and put in order a street on that part in front of his house eighty-five feet wide. The company accept the proposition, locate their road-bed accordingly, in December, 1869, but fail to open the street, &c., as late as September 1871. The company became insolvent before September 1871, and executed a mortgage of its property. In September, 1871, B notified the company, that unless the condition was performed within 15 days, he would re-possess himself of the land covered by the road-bed; *Held*, that

2. The injury threatened is within the technical meaning of irreparable damage, and the company is entitled to have the injunction continued to the hearing upon the equity confessed in the answer, but it was erroneous to perpetuate the injunction before a final hearing. *W. & T. R. R. Co.*, v. *Battle*, 540.

3. Where land is sold by deed and the vendee immediately re-conveys by mortgage, to secure payment of the purchase money, enters into possession and makes valuable improvements, and obtains an injunction to restrain a threatened sale under the terms of the mortgage, and the order is continued to the hearing; *Held*, that the defendants might move for a receiver. *Howes* v. *Mauney*, 218.

4. A bargainee, in a quit-claim deed, has no legal claim for damages if the title proves defective, nor to enjoin an execution issued upon a judgment based upon the purchase money.

5. In ascertaining the damages, sustained by reason of an injunction under the C. C. P., reference must be had to the condition of the debt enjoined; if, by reason of the delay, the judgment debtor has become insolvent, the whole debt would properly be included as damages sustained by it; if his pecuniary circumstances remained unaltered, no damages are sustained except the costs and disbursements. *McKesson* v. *Hennessee*, 473.

6. Whether, on a clear case for an injunction, made by the complaint filed in a Probate Court, this Court would force a plaintiff, by dismissing his action, to begin *de novo* in the Probate Court, discussed, but deemed unnecessary to be decided, as the Court does not consider such a case made by the complaint.

7. A complaint which alleges that an executor had power to sell land under the will and sold for Confederate money, received it and is about to make the purchaser a title; that the executor is insolvent and is wasting the assets, but does not charge collusion with the purchaser—does not present a case entitling the plaintiff to injunction relief. *Sprinkle* v. *Hutchinson*, 450.

INSURANCE:

1. The application for a policy of insurance forms a part of the contract of insurance where the policy refers to it, as such.

2. And in an action by the insured on such policy, the burden of proof is upon the plaintiff.

3. The application must be set out in the complaint, and being in the nature of a condition precedent, the truth of its representations must be proved by him.

4. A representative as to the value of the property insured, is material, even though the policy contains a stipulation to pay two-thirds of the real value, or less if the loss were not so much; but the doctrine of immateriality does not apply in such a case, the representation forming a part of the contract and being made in response to a direct question.

5. A charge in such a case, that the application was not a part of the contract; that the declaration as to value by the insured was a mere *representation*, and that the only question for the consideration of the jury was the value of the property burnt, is erroneous, and the error is not cured by the remark afterwards made to the jury, that unless such statements were fraudulent and false, they would not bar the plaintiff's right to recover.

6. Even treating the statement as to the value as a representation, it is a correct principle, that to prevent a recovery, it is necessary to show that the statement was fraudulent as well as false, and herein lies the difference between a representation as *an opinion* and a representation of *a fact*.

7. It is sufficient to avoid the policy that the representations were false, *however honestly made*—if material they must be *perfectly true*.

8. One whose property is insured at his own request in the name of another, being his agent, has an insurable interest. *Bobbitt* v. *The L. & L. & G. Insurance Co.*, 70.

ISSUES—SETTLEMENT OF:

1. Where issues to be tried by a jury, are tendered by the plaintiff,

and such issues are objected to by the defendant, and others tendered, and the presiding Judge directs those tendered by the plaintiff to be submitted, *held*, that there can be no appeal to the Supreme Court from such preliminary order.

Rules III, IV and V, adopted by the Supreme Court at June Term, 1871, discussed and fully explained by PEARSON, C. J. *School Committe* v. *Kesler*, 323.

JUDGE'S CHARGE:

1. The Act of the General Assembly of 1866–'67, entitled "an act relating to debts contracted during the war," and allowing either party to show on the trial, the consideration of the contract, and the jury in making up their verdict, to take the same into consideration, is not unconstitutional.

2. Therefore, it was not erroneous in a Judge to instruct a jury, that in making up their verdict, they might consider the value of the article sold, notwithstanding there was an agreement that the price should be paid in Confederate currency. *King* v. *W. & W. R. R. Co.*, 277.

3. Where a Judge, in response to a prayer for special instructions, complies strictly therewith, it cannot be error. More especially when his charge is quite as favorable as the testimony warrants.

4. Whether, under the words "my plantation," used in a will, all lands contiguous to the home place of the testator, will pass, *quere*. *McLendon* v. *Chisholm*, 100.

5. Where, on the trial of an action for breach of contract, it is alleged that the original contract, touching which there was no dispute, had been varied, and the contents of certain letters are relied upon, and the same being shown to be lost, there is parol proof of their contents, and it is admitted that the letters contained a modification, and there was no controversy as to the particular language used in them; *Held*, that this Court could not pronounce a charge erroneous which submits to the jury to find whether or not the contract had been modified as contended for, especially when the point made in this Court, to-wit., that His Honor should have instructed the jury as a question of law, whether the evidence proved a modification, does not appear to have been suggested in the Court below, but on the contrary, on the trial it seemed to be conceded, that if the contents of the letters were, as testified to, that there had been a modification and the contest was as to the fact of the existence of the letters.

6. Although the general rule is, that where a contract has existed in writing, it is the duty of the Judge, on proof of its contents (if lost), to instruct the jury as to the *legal effect* of the words, yet the rigorous application of this rule is often impracticable, it being impossible in many cases to separate the language used from its meaning, so as to eliminate one from the other.

7. Nor is it, in general, important when when the words used are untechnical, as in such cases a jury is as competent to pass on the effect as a Judge. *Calloway* v. *Bryce*, 514.

8. There is no formula by which Judges are bound, in charging upon the degree of mental capacity sufficient to make a will.

9. A charge that a testatrix must have had mind and intelligence sufficent, at the time she executed the will, to enable her to have a reasonable judgment of the kind and value of the property she proposed to will, and to whom she was willing it, is not erroneous, especially in a case where there was evidence of undue influence as well as in-

capacity, nor was it rendered erroneous, though given in connection with a refusal to give a prayer embracing *in ipsisimis verbis*, a definition of such capacity which had been approved by this Court.

10. It seldom does justice to the Judge or the case on trial, to select isolated expressions which have been held to be proper in other cases, and insist upon their being used by the Judge in his charge, because it is seldom that two cases are exactly alike, and if they are, and a charge in the first case has been approved by the appellate Court, *non constat*, that it would not have been approved if expressed in other language. *Lawrence* v. *Steel*, 584.

11. The stipuations contained in a contract in these words, viz.: "A B contracts with C D to furnish, at Long Creek Furnace, from 500 to 1,000 bushels of coal daily at 6½ cents per bushel, to be measured at the pit, C D to furnish the timber gratis wherever he may see fit, reserving groves and fruit trees, and advance to A B all the money, weekly, necessary to pay off the wood-choppers—coal to be paid for on delivery at the furnace," are dependent, and if, without fault on the part of the owner of the furnace, and without legal excuse, the other fails to deliver the quantity of coal agreed to be delivered, the owner of the furnace being sued for the value of coal, &c., furnished, may properly set up such failure by way of counter-claim.

12. In an action based upon such a contract, where it appears that there had been a failure to deliver 500 bushels of coal on any day, and that the defendant had failed to make as much iron, in consequence of such failure, as he otherwise would have done, a charge which does not allude to the counter-claim, based upon the foregoing facts, until attention is called to the omission, and which then merely states "that if the plaintiff failed to perform his contract he could not recover, and that if defendant failed he could not recover" —is erroneous, and especially in this case, where there seems to be no controversy as to the plaintiff's claim, and the main point of the controversy is as to the defendant's counter-claim.

13. A charge which misses the point of the case, and fails to enlighten the jury on the main points in controversy, cannot be sustained.

14. A Judge has not a right to hand to the jury a slip of paper containing an abbreviated estimate of plaintiff's claim for damages against the wish of the opposite party. *Burton* v. *Wilkes*, 604.

15. When a Judge, in charging the jury, uses this language, to-wit, "if her character (referring to a witness) is of ordinary respectability, you wil take her testimony *to be* true, unless she is fully and thoroughly contradicted," he is guilty of a violation of the Act of 1796. It is the province of the jury to pass upon the credibility of witnesses, and though the witness be never so respectable, yet, when there is a conflict of testimony, the Court cannot instruct the jury that they must take the testimony to be true.

16. Nor is this error corrected by the Judge, when, in a subsequent part of his charge, he uses language in referring to the same witness susceptible of two constructions. *State* v. *Henderson*, 627.

JUDICIAL SALE:

See COUNTER-CLAIM.

JUDGMENT:

1. It is well settled that a judgment, rendered according to the course of the Court, cannot be collaterally impeached.

2. Judgments of Justice's Court, regularly docketed upon the judgment docket of the Superior Court, form no exception to the principle above stated. *Reid* v. *Spoon*, 415.

3. In actions to recover real estate, brought against a defendant in an execution by a purchaser at a sheriff's sale of such property as the property of the defendant, in which a party, claiming to be the landlord of such defendant, is permitted to defend, the plaintiff is entitled to judgment against the execution defendant, but cannot be permitted to take out a writ of possession if he fails to recover against the other defendant. *Isler* v. *Foy*, 547.

JUDGMENT OF FORFEITURE:

See CRIMINAL PROCEEDINGS, 1.

JUDGMENT, IRREGULAR:

See CRIMINAL PROCEEDINGS, 2.

JUDGMENT NISI:

See CRIMINAL PROCEEDINGS.

JUDGES EXCHANGING CIRCUITS:

See EXCHANGE OF CIRCUITS.

JURISDICTION OF SUPREME COURT:

See PRACTICE—SUPREME COURT.

JURISDICTION—SUPERIOR COURT:

The Superior Courts possess no jurisdiction in actions in which a tort is waived and the sum received for property sold is sought to be recovered, if the amount demanded does not exceed $200. *Winslow* v. *Weith*, 432.

JURISDICTION—PROBATE COURT:

1. Proceedings to effect a settlement of an estate against an executor must be commenced before the Probate Court.

2. If in the course of the proceedings, injunctive relief is desired, application must be made to a Judge of the Superior Court. *Sprinkle* v. *Hutchinson*, 450.

JURISDICTION—JUSTICES OF THE PEACE:

1. Proceedings taken before a Justice of the Peace to recover the possession of real estate where the title comes in question are not absolute nullities.

2. The defendant may so treat them, but it does not follow that the plaintiff, who initiated and took the benefit of them, can.

3. When one is deprived of his land under color of judicial proceedings heard before such Justice, although jurisdiction is absolutely withheld from such Justice, on general principles the Superior Courts on appeal have a right to award him restitution.

4. Nor was the Superior Court confined, in dispensing the law on appeal, to mere restitution, but could also have allowed, had it been applied for, an inquiry of damages. *Dulin* v. *Howard*, 433.

5. Under our old system of practice and procedure, a Justice of the Peace had a right to grant a new trial when judgment was rendered against an absent party, if a proper application was made within ten days. Rev. Code, ch. 62, sec. 15. The provisions of that statute have not been materially changed under the new system. C. C. P., sec. 508.

6. When both parties to an action are present at the trial in a Justice's Court, and the case is heard, and judgment rendered, a new trial cannot be allowed. The party dissatisfied must appeal to the Superior Court. C. C. P., sec. 528. *Froneberger* v. *Lee*, 333.

JURORS, PAY OF:

One summoned as a juror on a coroner's inquest, is not entitled to any compensation. *Green* v. *Wynne*, 530.

KILLING STOCK:

1. It is enacted by the Act of 1856–'57, chap. 7, "that when any cattle or other live stock shall be killed or injured by the engines or cars running upon any railroad, it shall be *prima facie* evidence of negligence;" this rule can only be rebutted by showing that the agents of such railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence.

2. Independent of the legal presumption, where railroad cars were left on an inclined plane, where they could be easily set in motion, and were very insecurely fastened, and one of the animals, for the killing of which this suit was brought, was killed a month previous to the other, by a car, which had escaped and run down the same grade, and the agents of the defendant, being thus apprised of the danger of such action, did not use proper precautions to prevent further injury; *held*, to be gross negligence, for which the company was responsible, *Battle* v. *W. & W. R. R. Co.*, 343.

LANDLORD AND TENANT:

Whatever may have been the rule under the former practice, under the provisions of the C. C. P., a landlord let in to defend in a civil action for the recovery of land is not restricted to the defences to which his tenant is confined, nor is this principle varied by the circumstances that the plaintiff is purchaser at execution sale against such tenant, and that the latter was in possession at the date of the sale and of the commencement of the action. *Isler* v. *Foy*, 546.

See TENANTS AND TENANCY.

LARCENY:

See CRIMINAL ACTION.

LEASES:

See TENANTS AND TENANCY.

LEGACY:

See ADMINISTRATORS AND EXECUTORS.

WILLS, construction of, 1, 2, 4, 5.

"LETTER:"

See AGENCY, 7.

LICENSE:

1. CASE:—A railway company having a right, by virtue of its charter, to locate its road-bed on a certain portion of the land of B, he proposes by letter, that if the company will refrain from such location, it may locate it over another portion of his land: *Provided* it would open, grade and put in order a street, on that part in front of his house eighty-five feet wide. The company accept the proposition, locate their road-bed accordingly, in December, 1869, but fail to

open the street, &c., as late as September, 1871. The company become insolvent before September, 1871, and execute a mortgage of its property. In September, 1871, B notifies the company, that unless the condition is performed within 15 days, he will re possess himself of the land covered by the road-bed; *Held*:

(1.) That the opening, &c., of a street was not a condition precedent to the exercise of right to locate.

(2.) That the proposition contained in B's letter was not a mere license, revocable at will.

(3.) That while at law no easement passed to the company, because an easement in land can be created only under seal, yet, the writing by which the defendant charged himself, was binding within the statute of frauds, and would be specifically enforced, and, between the parties and to protect the rights of the licensee, this Court acting upon the familiar maxim of equity that what ought to be done is considered as done, would consider that a grant of the easement had been made.

2. A license, even under seal, (if it be a mere license) is as revocable as one by parol; on the other hand, a license by parol, coupled with an interest and founded on a valuable consideration, is as irrevocable as if made by a deed.

3. The license specified above is of the latter class.

4. The transaction may also be viewed as a contract, entitling either party to a specific performance. *W. & T. R. R. Co.* v. *Battle*, 540.

LIEN:

1. The wrongful refusal of a Court to permit a judgment-creditor to have execution on his judgment, does not operate (upon the abolition of such Court, pending an appeal from such refusal) to impair any lien acquired theretofore, or which might have been acquired thereafter, but for such refusal, under the maxim *actus legis nemini facit injuriam.*

2. Hence, where, after judgment obtained in 1861, and executions regularly kept up thereon, a motion was made by a judgment-creditor, in 1866, in one of the late County Courts for execution upon his judgment, which was wrongfully refused, and pending an appeal therefrom, such Court was abolished, it was *held* that one who purchased from the debtor pending the appeal, took the legal estate, but subject to such lien as would have been acquired, had execution issued.

3. In such a case, if the judgment-creditor had not a complete lien upon the estate of his debtor, he had at least an *inchoate* lien, with a right to perfect it by issuing an execution; his proceeding to cause execution to be issued, constituted a *lis pendens*, of which every one is held to have had notice, and a party purchasing from the judgment-debtor, pending the proceedings, is considered as dealing with him under exactly the same conditions, and subject to the same liens, as if the County Court had not refused an execution, and the same had been regularly issued.

4. The creditor so delayed must be placed in *statu quo*, and as a corollary, any such purchaser is affected with notice by a presumption *juris et de jure.*

5. The above-stated rule is founded on the maxim *penkente lite nihil innovetur*, and is sustained by considerations of public policy. *Isler* v. *Brown*, 556.

LIEN OF EXECUTION:

See CONFLICT OF JURISDICTION.

LIEN OF JUDGMENT:

See SUPPLIMENTAL PROCEEDINGS, 1.

LIMITATIONS, STATUTE OF:

See CRIMINAL PROCEEDINGS.
REGISTRATION.

LIS PENDENS:

See LIEN, 3.

MANDAMUS:

1. Whether a mandamus can be used to try the title to an office, under any circumstances, *quere?*
2. But not being provided for by the C. C. P., it must, by virtue of sec. 392, C. C. P., be governed by the former practice, and hence, must be moved for, and be made returnable in *term time. Howerton* v. *Tate*, 231.
3. Mandamus is not the appropriate remedy to try title to an office. *Mott* v. *Tate*, 214, n.
4. Mandamus will not lie to compel the Treasurer to pay money on any claim against the State, until the same has been passed upon and a warrant issued by the Auditor for that purpose.
5. When the Legislature has forbidden a warrant to be issued, claimant must apply to that body for redress, or institute proceedings in the Supreme Court. *Bayne* v. *Jenkins*, 356.
6. To an action by mandamus instituted against the Justices of a county, commissioners elected under the Constitution cannot be substituted as parties, and this error is not waived by answer, but may be taken advantage of at any stage of the proceedings.
7. A mandamas against the commissioners of a county, should run against them as "a board" and not against the individuals comprising such board. *Thomas* v. *Commissioners of Carteret*, 322.

MAINTENANCE OF BASTARDS:

See BASTARDY.

MARRIAGE:

See DOWER.

MARRIED WOMEN:

See SEPARATE ESTATE.
DOWER.

MEASURE OF DAMAGE:

See ACTION CAUSING DEATH, 1.

MAXIMS, ETC., QUOTED:

Actus legis nemini facit injuriam, 559.

Concensus tollit errorem, 523.

Nemo tenetur stipsum accusare, 109.

Pendente lite nihil, etc., 563.

Privatum incommodum publico bono pensatur, 145, 187, 221, 563.

Qui tacet clamat, 508.
Salus populi, suprema lex, 282.
Ut res magis valeat, etc., 205.
Vigilantibus non dormientibus, etc., 237.
Tabula in naufragio, 182.

MENTAL CAPACITY:

1. There is no formula by which Judges are bound, in charging upon the degree of mental capacity, sufficient to make a will.
2. A charge that a testatrix must have had mind and intelligence sufficient, at the time she executed the will, to enable her to have a reasonable judgment of the kind and value of the property she proposed to will, and to whom she was willing it, is not erroneous, especially in a case where there was evidence of undue influence as well as incapacity, nor was it rendered erroneous, though given in connection with a refusal to give a prayer embracing *in ipsissimis verbis*, a definition of such capacity which had been approved by this Court. *Lawrence* v. *Steel*, 584.

MILITARY ORDERS:

See AMNESTY.

MONEY BORROWED:

See ILLEGAL CONSIDERATION, 5, 6, 7.

MORTGAGE:

1. Upon the execution of a mortgage, the mortgagor becomes the *equitable*, and the mortgagee the *legal* owner, and this relative situation remains until the mortgage is redeemed or foreclosed.
2. Until the day of redemption be past, the mortgagor has a legal right, and after, an equity of redemption.
3. A mortgagor allowed to remain in possession, by the long acquiescence and implied approval of the mortgagee, is not a trespasser but a permissive occupant, and as such, is entitled to reasonable demand to terminate the implied license before an action can be brought to recover possession.
4. A purchaser of the mortgagor's estate under execution, and (where he has leased), his lessees are entitled to the right of the mortgagor. *Hemphill* v. *Ross*, 477.
5. A Court of Equity will never decree a foreclosure of a mortgage until the period limited for payment has expired. It cannot shorten the time given, by express covenant and agreement between the parties, as that would be to alter the nature of the contract to the injury of the party affected.
6. When a mortgage is executed, and it is stipulated that if the mortgagor, "shall well and truly pay and discharge said debts, according to agreement—the one-third part in three years, one-third in four years, and the remainder in five years from date, then the said deed to be void: *Held*, that the said mortgage cannot be foreclosed until the last period mentioned, viz: five years.
7. If the said deed had stipulated that the estate should be forfeited on the failure to pay the specified instalments of debts, then on said failure, the mortgagee could have called for his money or proceeded to foreclose.

8. Where a bill, to foreclose a mortgage, is filed against several defendants, some of whom claim a portion of the lands described in the pleading under a prior mortgage, and they do not ask that the same be sold: *Held*, that it is error to decree that said mortgaged premises be sold for the benefit of the said defendants. *Harshaw* v. *McKesson*, 266.

MORTGAGOR AND MORTGAGEE:

See EQUITABLE JURISPRUDENCE, 1.

NEGLIGENCE:

See CARRIERS OF PASSENGERS.

NEW STAY LAW:

See VENUE OF ACTIONS.

NEW TRIAL:

See CRIMINAL PROCEEDINGS.

NOT GUILTY:

See CRIMINAL PROCEEDINGS.

NOTICE TO QUIT:

See TENANTS AND TENANCY, 1.

NUL TIEL RECORD:

See JUDGMENT, 1, 2.

PRACTICE GENERALLY, 13.

OFFICE:

1. "The Governor shall nominate, and, by and with the advice and consent of a majority of the Senators elect, appoint all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly." Section 10, Article 3 of Constitution.

2. The words contained in the above section of the Constitution, "whose appointments are not otherwise provided for," mean provided for by the Constitution, and the words "no such officer shall be appointed or elected by the General Assembly," are superadded as an express veto upon the power of the General Assembly, whether such office be established by the Constitution or be created by act of the General Assembly.

3. A public office is an agency for the State, and the person, whose duty it is to perform that agency, is a public officer. Nor does it make any difference whether he receives a salary and fees and takes an oath, these being mere incidents and no part of the office itself. Nor is it material whether one act or a series of acts are required to be done.

4. The Act of the General Assembly, passed April 6th, 1871, giving to the President of the Senate and Speaker of the House of Representatives the power to appoint "all proxies and directors in all corporations in which the State has an interest," creates a public office and fills the same by appointment of the Legislature. It is therefore unconstitutional.

5. The power of the General Assembly to repeal an act, which had been passed since the adoption of the Constitution, and accepted by

the railroad company as an amendment to their charter, discussed by PEARSON, C. J. *Clark* v. *Stanley*, 59.

6. Title to an office cannot be tried by mandamus. *Mott* v. *Tate*, 231, n.

ORDERS APPEALABLE:

See ISSUES, settlement of.

OVERDUE NOTE:

1. A note founded upon an illegal consideration, *payable one day after date*, endorsed after one day from its date, cannot be recovered on by the endorsee.

2. A note payable one day after date, is due one day after date. *Baucom* v. *Smith*, 537.

OVERSEER:

An overseer who contracts to carry on a farm for the owner at a fixed salary for the year, is entitled to recover for the value of his services, where he quits his employer before the expiration of the year, because his employer sells out the plantation, stock and crop, and directs the overseer to remain and carry out the contract with the purchaser of the plantation. *Woodley* v. *Bond*, 396.

PARENT AND CHILD:

1. When a father is indebted to his children, and gives them property or money at their maturity or marriage, the presumption is that this is a payment of the debt, and not an advancement. This presumption is, however, liable to be rebutted by the facts of the case.

2. If money is given to a son-in-law, under similar circumstances, or paid by the father-in-law as surety, the same rule applies.

3. If a father, while actiug as executor, receives into his possession a number of slaves bequeathed to his children, and afterwards sells one of them, and retains and controls the others until their emancipation: *Held*, that in an action for an account for the hire of said slaves, etc , it shall be determined as a fact, whether he converted or intended to convert the slaves to his own use, or whether he held them as trustee or bailee for his children. If the former, a debt is established, and the presumtion above referred to applies—otherwise it does not.

4. A trustee is generally entitled to commissions, but when a person is trustee by reason of his being executor, and voluntarily assumes control of a fund willed to minor children, he not being their guardian, he is not entitled to commissions.

5. A father is bound to support his children, if he has ability to do so, whether they have property or not, and he is not entitled to any credit for such support in a settlement of accounts between them and himself.

PAROL TRUST:

See TRUST ESTATES, 5, 6, 7, 8.

PAROL ESTOPPEL:

See ESTOPPEL, 5, 6, 7, 8.

PAROL EASEMENTS:

See LICENSE.

PAY OF EXPERT WITNESS:

See EXPERT, &c.

PAY OF JUROR ON CORONER'S INQUEST:

See JUROR'S, pay of.

PARTIES:

1. When a demurrer is filed for want of a proper party, and from the facts presented by the pleadings, as in this case, the matter is left in doubt, the Court cannot render judgment, but remand the cause.
2. Where a contract was made for the sale of land, and a bond was given to make title upon the payment of the purchase money, and a portion of the purchase money being unpaid, an action was brought by the vendor against the vendee to sell the lands for payment of the balance due; *Held*, that in such action the wife of the vendee was not a proper party, if the marriage took place prior to March 2d, 1867; *aliter*, if the marriage took place subsequent to that time.
3. The wife of a purchaser, who holds lands under a bond for title, has a contingent right of dower to the extent of the payments made by her husband. *Bunting* v. *Foy*, 193.
4. In an action for an account against an executor the personal representative, and not the children of a deceased legatee, should be made a party. *Hagler* v. *McCombs*, 345.

PARTNERSHIPS:

See PERSONAL PROPERTY EXEMPTION, 3.

PERSONAL PROPERTY EXEMPTION:

1. The personal property exemption, provided for by Art. X of the Constitution and the laws, passed pursuant thereto, existing only during the life of the "homesteader," and after his death passes to his personal representative, to be disposed of in a due course of administration. *Johnson* v. *Cross*, 167.
2. An execution debtor is entitled to a personal property exemption, notwithstanding an execution issued against his property, bore *teste* before the adoption of the Constitution, if there was no levy made until after. *Horton* v. *McCall*, 159.
3. Whether a partner, on a deficiency of partnership assets to pay partnership debts, is entitled to a personal property exemption of $500 out of such assets, in preference to the said debts, and whether if such partner has individual property sufficient to cover such exemption, he shall be compelled to resort to that, are questions of great importance and deserving serious consideration; but as the facts out of which they arise are only set forth inferentially, this Court will not proceed to consider them, but remand the cause to the end that the facts may be ascertained and the rights of the parties declared. *Burns* v. *Harris*, 509.

PLEADING:

When a pleading shows that parties, other than those of record, have an important interest in the decision of the cause, the omission to set out their names is an inexcusable error, as a complete decree cannot be made without their presence before the Court, and the Court cannot see under the general phrase "certain parties," who they are. *Whitted* v. *Nash*, 590.

POWER OF ATTORNEY—RIGHT TO DEMAND:

1. A defendant has a right, at the return term of a summons in an ac-

tion, to demand of the plaintiff's counsel his authority for entering an appearance. Rev. Code, ch. 31, sec. 57, Rule 16.

2. If the demand for the power of attorney be made at the return term, it is the practice, and within the discretion of the Judge, to extend the time; if, however, such demand is not made at the proper time, and before the right to appear has been recognized, it comes too late, unless there be peculiar circumstances tending to excuse the party for not making it in apt time. *Reece* v. *Reece*, 379.

PRACTICE GENERALLY:

1. A statute is to be construed prospectively, unless a contrary intention is clearly expressed therein. Therefore, where an action was commenced on the 18th day of March, 1870, and subsequently the Legislature passed an act changing the mode of procedure, it can have no application to such cause, and the action must be tried according to the law existing at the commencement of said action.

2. When an action under the old system was brought for goods sold and delivered to the defendant, and he demurs thereto, if the Court overrules the demurrer, it would be irregular to grant a final judgment, but such judgment must only be interlocutory, and the inquisition of a jury is necessary to ascertain the value of the goods so sold after having the proofs of both parties to the action. *Merwin* v. *Ballard*, 398.

3. In an action to recover the possession of realty, the Court has the power to allow the defendant to file a bond for costs, at the second term after the answer has been filed; nor is it necessary that any of the defendants should sign such bond. *Wall* v. *Fairly*, 335.

4. On a motion made to vacate a judgment under the 133 section C. C. P., it is the duty of the Judge to find and state the facts, in order that his decision thereon may be revised by this Court.

5. In such case, where one of the grounds was, that the action (which was commenced under the old system) had not been transferred in due time, a statement of the Judge that "the action was transferred within the time prescribed by law," is not a sufficient finding of the facts, but he should have stated when the suit was transferred. *Powell* v. *Weith*, 423.

6. It is erroneous for a Superior Court to pronounce any judgment, if the facts are controverted, until the same have been ascertained in some of the modes provided for. *Leggett* v *Leggett*, 420.

7. Under the provisions of the C. C. P., an attachment is not the foundation of an independent action, but is a proceeding in the cause, in the same action already commenced, and is an auciliary remedy and collateral to such action.

8. Hence, a stranger to the action in aid of which the attachment is issued, has no right to intervene, and make himself a party thereto, though, upon proof of interest in the property attached, he may be allowed to make up a collateral issue of title. *Toms* v *Warson*, 417.

9. "All acts and proceedings by or against a county, in its corporate capacity, should be in the name of the Board of Commissioners." Acts of 1868, ch. 20.

10. An order to show cause, which is in the nature of an alternative writ of mandamus, ought not to be directed to the individuals composing the Board of Commissioners. It is only in the case of disobience that they can be proceeded against individually.

11. When an erroneous ruling is the ground for an appeal, an amendment cannot be allowed in the Supreme Court, which would defeat the cause of appeal. *Askew* v. *Pollock*, 49.

12. Where a suit was brought in the name of A B, Guardian, *v.* C D, and was stated on the docket in the name of A B, Gau., sometimes in the name of A B, and sometimes A B, Ex'r or Adm'r, and after the death of plaintiff was suggested and his personal representative was made a party it continued on the docket in the same name, until judgment was rendered, which was in favor of the plaintiff for debt and costs; *Held*, that though the clerk as a mere index or memorandum, continued to state the case on the docket as it had stood before, yet as it was the same case, it was a judgment in favor of the personal representative.

13. When a plaintiff in his complaint purports to set out a judgment between certain parties, and defendant pleads *nul tiel record*, and it appears from an examination of the record, with *reasonable certainty*, that the judgment and record are the same, *held* to be sufficient.

14. The Supreme Court cannot reverse the finding of a Judge below, upon the facts, yet they have a right to reverse his rulings upon the legal effect and operation of a record.

15. After judgment, the statutes of amendment cure defects arising from "mistake in the name of any party or person, or for an informality in entering judgment, or in making up a record," Rev. Code, ch. 3; and "no variance between allegation and proof shalll be material, unless it has misled." C. C. P., sec. 128. *Gibbs* v. *Fuller*, 116.

16. Where a note was given in 1863, payable two years after date, and "*to be paid in the current funds of the country, when due*," *held*, that the Act of 1866–'67, which raises the presumption that all contracts to pay money, made during the war, were intended to be payable in Confederate money, cannot apply where the writing itself shows a different intent. When the contract is to pay so many dollars, evidence may be received to show that the real agreement was to pay in some other than Confederate currency.

17. When the makers of a note, given for the rent of land, set up as a defence to the action, that the payees in said note had no title to the land, and no right to lease the same, and it was replied, that the guardian of the real owners of the land had, since the lease was given, ratified the same by receiving payment, and had entered a *retraxit* in a suit brought against one of the occupants under the lease; *Held*, that such replication was sufficient to defeat the defence relied on.

18. The mere fact that there is a paramount title outstanding, or a claim set up against the tenant by the true owner, will not authorize him to dispute the title of his landlord. He must have been compelled to make some payment to the true owner, to avoid an eviction, and such payment is regarded as a payment to the landlord, and to be deducted from the rent.

19. Where in an action upon such note, one of the plaintiffs is introduced as a witness, and it is proposed to ask him whether he did not know the purpose of the lease; *Held*, that such question is immaterial, as it could make no difference whether the plaintiffs knew, or did not know the, purpose of the lease. *McKesson* v, *Jones*, 258.

PRACTICE CODE:

1. A summons issued from the court of one county cannot be made returnable unto the court of another. *Howerton* v. *Tate*, 431.

2. Pending a motion to set aside an execution, and cause satisfaction of a judgment upon which it was based to be entered of record, a Judge of the Superior Court can, in the exercise of a sound discretion, sub-

mit such issues of fact to a jury arising on conflict of testimony as he may deem proper, and this Court will not attempt to control its exercise.

3. Under our present system, Courts of law and equity have been blended.

4. When a Judge of the Superior Court has power to pass upon questions of fact, in the administration of Justice, and he becomes perplexed by a conflict of testimony, he may, and should, enlighten his conscience by referring their solution to the determination of a jury, and in the mean time to cause the execution to be superseded.

5. A jury is the appropriate tribunal to determine matters of fact rendered doubtful by contradictory evidence.

6. A Judge may refer all questions of fact, which he can lawfully determine to the decision of a jury. *Moye* v. *Codgell*, 403.

7. A claim for dower, under the Act of 1869, set up in 1872, the husband being still alive, cannot be sustained.

8. A demand for dower is a special proceeding, returnable before the Clerk.

9. On appeal to this Court, an undertaking of appeal must be sent up with the transcript. *Felton* v. *Elliott*, 195.

10. Where the defendant, in an action of debt upon a promissory note, given in 1862, proposes to prove that the consideration of the note was Confederate money, and that fact was admitted by the plaintiff in the action; *Held*, that such evidence was immaterial.

11. Under the ordinance of 1865, and the Act of 1866-'67, a party to to an action has a right to show that the consideration of the note sued on was property, and the value of the property; and, when money was borrowed, to rebut the presumption of the law, by proving that it was not to be paid in *Confederate currency*, but in some other money or article.

12. Evidence cannot be introduced to contradict or vary a written contract, except in the cases authorized by the Acts of 1866-'67, the general rule of evidence to such contracts being still in force, with the exceptions stated.

13. In an action which was commenced before the C. C. P., a defendant cannot claim, by way of set-off or *recoupement*, unliquidated damages arising out of an executory contract. *Terrell* v. *Walker*, 244.

14. If a suit be referred by an entry on the docket in these words, viz: "this case is referred to A B, who shall summon the parties before him and hear the case, and his award shall be a rule of Court," and the referee files a paper which he styles an award, in which he finds the facts and his conclusions as an award; whether it is to be treated as on award under a rule, or a reference under the C. C. P., the referee's finding of the facts is equally conclusive, as are also his conclusions as to the law arising on the facts, except probably where he undertakes to make the case turn upon a question of law and clearly mistakes it.

15. When a guardian lent trust funds to a firm of which he was a member, and took their note payable to himself, although under the old system he could not sue at law, under the present system, by virtue of the conjunction of law and equity, a civil action upon such instrument may be maintained.

16. Independent of this view, relief under the C. C. P., sec. 249, is obtainable on the principle that the *cestui que trust* may follow the trust fund into whose hands soever the trust may be found,

17. Nor in a suit on such note by the husband of the ward, to whom it had been assigned by the guardian, can it be objected that the guardian is not made party, as by virtue of sec. 63, C. C. P., persons severally liable may all or any be included as defendants.

18. The objection that one of the wards is not made a party, induces the Court to modify the judgment of the Court below. *Gudger* v. *Baird*, 438.

19. The Act of the General Assembly of 1868–'69, chap. 251, requiring that the *venue* in actions against Railroad Companies shall be laid in some county wherein the tract of said railroad, or some part of it, is situated," is not in conflict with sec. 7, Art I, of the Constitution. The jurisdiction of the Courts and the *venue* of actions, have always been subjects of legislation.

20. The "repeal of a statute shall not effect any suit, brought before the repeal, for any forfeiture incurred, or for the recovery of any rights accruing under such statute." Rev. Code, ch. 108, sec. 1.

21. The question as to where a case ought to be tried, is preliminary to the trial, and must be determined by the Judge. And this question can be as well tried on a motion to dismiss (the facts being verified by affidavits), as upon a plea to the jurisdiction. *Kingsbury* v. *C. R. R. Co.*, 284.

22. Before this Court can vacate a judgment on the ground of excusable neglect, under C. C. P., sec. 133, it is the duty of the Judge of the Superior Court to find the facts as they should be set out in a special verdict.

23. In cases arising under the new system, issues of fact cannot be heard before this Court, and it can only review the law which His Honor below applies to the facts as found by him. *Clegg* v. *The N. Y. W. S. S. Co.*, 391.

24. Where a judgment was obtained before a Justice of the Peace, and docketed in the office of the Superior Court Clerk, the Court has no power, upon motion, to set aside such judgment and enter the same upon the civil issue docket.

25. If a party has merits and desires a new trial in the Superior Court, upon a matter heard before a Justice of the Peace, he must, by a proper application, obtain a writ of *recordari* as a substitute for an appeal. The writ of *recordari* and not *certiorori* is the proper remedy, the Justice's Court not being a Court of record.

26. Where a judgment was obtained before a Justice of the Peace, and docketed in the office of the Superior Court Clerk, the Superior Court has no power, on motion, to vacate such judgment and enter the cause on the civil issue docket. *Ledbetter* v. *Osborne*, 379.

27. The principle that a tenant cannot dispute his landlord's title, is in full force; but a tenant was never prevented from showing an equitable title in himself, or any facts which would make it inequitable to use his legal estate to deprive him of the possession.

28. For this purpose formerly, the tenant was driven into equity, but under the present system, the tenant, in such cases, can avail himself of such equitable defence by his answer.

29. If such a defence cannot be set up in the Superior Court, it cannot be anywhere, as we have no separate Courts of Equity. *Turner* v. *Lowe*, 413.

PRACTICE—CRIMINAL:

1. An appeal cannot be taken on the State docket from an interlocutory order or judgment.

2. **Where a matter involves the power of a Superior Court, and error in its exercise, as where,** in a capital case, a Judge improperly discharges a jury, and refuses to discharge the prisoner, the record of the Court below may be brought up for review by a writ of *certiorari* in the nature of a writ of error. Art. 4, sec. 10 Const.

3. In such case, the proper course is to ask for a rule to show cause why the writ should not issue, and as a foundation for the order, the Court will require a petition in due form.

4. In a trial for a capital felony, the Judge, for sufficient cause, may discharge a jury and hold the prisoner for another trial; in which case, it is his duty to find the facts and set them out on the record, that his conclusions upon matters of law, arising upon the facts, may be reviewed by this Court.

5. It is the duty of a Judge to be personally present in Court, and to find judicially, the facts upon which his conclusions are based. Judicial power cannot be delegated. Where, therefore, a Judge is absent from the Court, and telegraphs to the Clerk to discharge a jury, and the Clerk so does; *Held*, to be error, and the prisoner in such case is entitled to his discharge. *State* v. *Jefferson*, 309.

PRACTICE—EQUITY:

1. Where a judgment was obtained in a Court of law, and an injunction was afterwards issued to restrain the collection of it, which injunction was disolved and judgment entered upon the injunction bond: *Held*, that a motion to vacate the late judgment, upon the allegation that the *original one* had been satisfied by payment to the sheriff, could not be entertained.

2. If such payment had been made, the regular and proper course would have been to plead the same, or have satisfaction entered upon the record, and not offer proof of payment upon a motion to vacate a regular judgment. *Council* v. *Willis*, 359.

3. Where no final decree has been rendered in a suit in the late Court of Equity, it must be proceeded in according to the pracice of Courts of Equity existing when our present Constitution was adopted.

4. Under the former system, orders and decrees in such suits could only be made in term time.

5. Where a petition for the sale of land was filed in one of the late Courts of Equity, no final decree having been rendered therein at the adoption of the Constitution, the Clerk of the Superior Court has no jurisdiction, and the Judge none, except at term time, to hear and determine a petition filed in the cause praying for a re-sale of the property. *Greene* v. *Moore*, 425.

6. When a rule was taken upon the Clerk of the Superior Court, to show cause why he should not pay a certain sum of money, decreed to be paid out of funds in his hands, it is no answer to the rule to set forth facts tending to show that the original decree was erroneous.

7. An error in a decree cannot be corrected or reviewed under a rule to show cause. To effect that purpose, regular proceedings must be instituted, having that end in view. *Long* v. *Cole*, 381.

8. Where a bill in equity was filed to foreclose a mortgage, and a final decree was obtained, the defendant (the mortgagor) cannot avail himself, by a suggestion in the nature of a plea, since the continuance, of the pendency of another suit in the District Court of the United States "to force him into bankruptcy."

9. For 1st. It does not appear that both suits were for the same cause of action. 2d. A plea *puis darrien continuance*, is not admissible in a Court of Equity. 3d. The case of a mortgagee is an exception to the general rule, and he may proceed on his mortgage in *Equity*, and on his debt at *law*. 4th. The matter which had existed so long, comes too late after hearing and decree. *Wesson* v. *Johnson*, 189.

PRACTICE—SUPREME COURT:

1. An appeal cannot be taken on the State docket from an interlocutory order or judgment.
2. Where a matter involves the power of a Superior Court and error in its exercise, as where, in a capital case, a Judge improperly discharges a jury, and refuses to discharge the prisoner, the record of the Court below may be brought up for review, by a writ of *certiorari* in the nature of a writ of error. Art. IV, sec. 10, Const.
3. In such case, the proper course is to ask for a rule to show cause why the writ should not issue, and as a foundation for the order, the Court will require a petition in due form. *State* v. *Jefferson*, 309.
4. In old equity cases depending at the adoption of the Constitution, and brought here by appeal, if the facts are not found and set out, but the evidence fully satisfies the Court on which side the conscience and justice of the case lies, it will proceed to hear and determine the same.
5. In such cases, if this Court is satisfied that a note in possession of the wife of one, as a mere custodian, was obtained from her through the covin and cajolement of the maker, under pretence of a settlement, it will not decree a re-execution (the note being overdue), but an account of what is due thereon, and render a decree for such amount, upon the principle of surcharging and falsifying. *Turpin* v. *Herren*, 519.
6. Where it appears to this Court, that the Judge below, has, from the the statement of the appellant, the objections of the appellee and his own notes, been enabled to make out a case containing the substantial merits of the controversy, the appeal will not be dismissed, although there was great irregularity in the proceeding below.
7. Nor will the appeal be dismissed, because the statement of the Judge below, (Judge Henry) was made out of the District in which the suit was tried (9th), unless the record shows that the appellee demanded to be present, and that by reason of his absence, he was prejudiced, especially when the error consists in the rejection of material and competent evidence.
8. This Court is disposed to extend liberality in matters of appeal-practice, as the profession have not yet become familiar with the new system. *Whiteside* v. *Williams*, 123.
9. The Supreme Court cannot reverse the finding of a Judge below, upon the facts, yet they have a right to reverse his ruling upon the legal effect and operation of a record.
10. After a judgment, the statutes of amendment cure defects arising from "mistake in the name of any party or person, or for any informality in entering judgment, or in making up a record." Rev. Code, ch. 3; and "no variance between allegations and proof shall be material, unless it has misled." C. C. P., sec. 128. *Gibbs* v. *Fuller*, 111.
11. A judgment appealed from, must be affirmed in this Court, no error being assigned on the record, in cases where the statement as prepared by the appellant, has been returned with objections, and the

appellant had failed to apply to the Judge below, to give the parties a day to settle the case as prescribed by sec. 301, C. C. P.

12. In such case, upon proper affidavit, an order will be made to the Judge to certify a statement; but if the Judge returns to such order that no application to settle the case had been made, the appellant is without remedy.

13. Although issues, in old equity suits pending in this Court, have been settled and ordered here, if, after a verdict on them, this Court, on a careful examination of the whole case, discovers that the full merits of the controversy cannot be determined in the issues so found, it will order any other issues it deems necessary to a complete determination. *Lentile* v. *Hart*, 421.

14. Whether a partner, on a deficiency of partnership assets, to pay partnership debts, is entitled to a personal property exemption of $500 out of such assets in preference to the said debts, and whether, if such partner has individual property sufficient to cover such exemption, he shall be compelled to resort to that, are questions of great importance, and deserving serious consideration; but as the facts, out of which they arise, are only set forth inferentially, this Court will not proceed to consider them, but remand the cause to the end that the facts may be ascertained, and the rights of the parties declared. *Burns* v. *Harris*, 509.

15. A decree *ought* in all, and *must* in cases of an equity character, arising under the C. C. P., declare the facts upon which the law is adjudged.

16. In equity cases pending at the adoption of the C. C. P., this Court can either try the facts or direct issues to be sent down, but usually adopts the latter course, as in this case. *Burbank* v. *Wiley*, 58.

17. This Court has no power to order a *certiorari* without requiring bond and security thereon. *Weber* v. *Taylor*, 412.

18. On an appeal to this Court, an undertaking of appeal must be sent up with the transcript. *Felton* v. *Elliot*, 195.

See CODE-PLEADING, 16.

PERMISSIVE OCCUPANT:

See MORTGAGE, 3.

POSSESSION, EFFECT OF, IN PLEADING:

See ESTOPPEL, 3.

PRESUMPTION—JURIS ET DE JURE:

See LIEN, 4.

PRINCIPAL:

See AGENCY.

PRIVY EXAMINATION:

1. By section 9, chapter 37, of the Revised Statutes, "all conveyances in writing by husband and wife for any lands, personally acknowledged before a Judge, &c., the wife being privily examined, &c., shall be as valid to convey the wife's estate in such lands as she may have, whether in fee simple or otherwise, as if it were done by fine and recovery; and if a commissioner be appointed under section 10 of said act, to take such acknowledgment, privy examination, &c., it shall be as effectual as if personally acknowledged before the Judge or County Court." Revised Statutes, secs. 9 and 10, chap. 37.

2. Fines and recoveries are matters of record in the Court of Common Pleas in England, and cannot be impeached collaterally in an action of ejectment, or vacated or set aside without some direct proceeding instituted for that purpose.
3. In this State, the acknowledgement and examination of a married woman before a Judge or County Court, as the law was in 1833, has the force of, and is in fact, a record. She cannot be heard to impeach the truth of the record, or vacate the same, although the examination was not separate and apart from her husband, and she was subject to the influence of his presence, and although she was not of sound mind and could not "voluntarily assent thereto."
4. Possibly: When the examination is taken by a commissioner, a married woman may maintain a bill in equity, to cancel the deed on the ground of fraud, and a false certificate by the commissioners. Yet this assurance of title, and conveyance of record cannot be impeached collaterally in an action to recover the land.
5. This proceeding and record is not a mere deed, so far as a married woman is concerned, but is "an assurance of title by record." It is not a mere probate for the sake of registration, but is a "fine," and puts an end to the matter.

PROCESS:

See PRACTICE GENERALLY, 7, 9, 10, 12.

PRACTICE—CODE, 7, 15, 18.

PRACTICE—EQUITY, 5, 6.

PRACTICE—SUPREME, 2, 12, 17.

PROPORTION:

See WILL, Construction of, 3, 4, 5.

PROXIMATE CAUSE:

See CARRIERS OF GOODS, 5.

PURCHASER:

Where a deed in trust is made to secure certain specified debts, one of which is tainted with usury, and a purchaser buys at the trustee's sale for valuable consideration, and without notice of the illegality of the consideration of the said debt; *Held*, that his title is not affected thereby. *McNeill* v. *Riddle*, 990.

PURCHASER OF MORTGAGOR'S INTEREST:

See MORTGAGE, 4.

PURCHASER AT SHERIFF'S SALE:

See SHERIFF, &c.

PURCHASE-MONEY, APPLICATION OF:

See ADMINISTRATORS AND EXECUTORS, 19.

PURCHASE OF OVERDUE PAPER:

See ILLEGAL CONSIDERATION, 3.

QUANDO JUDGMENT:

See COUNTER-CLAIM.

QUERE:

(AGENCY.) *Pinnix* v. *C. & S. C. R. R. Co.*, 34.

(CONSTRUCTION OF A WORD.) *McLennan* v. *Chisholm*, 100.

(MOVING FOR JUDGMENT,) *State* v. *Wise*, 120.

(POINT ON DOWER ACT.) *Sutton* v. *Askew*, 172.

(WHO CAN CONTEST WANT OF CONSIDERATION.) *Ivey* v. *Granbery*, 223.

(RIGHT OF ASSIGNEE TO SUE *in forma pauperis*.) *Osborne* v. *Henry*, 354.

(VACATING JUDGMENTS.) *Kirkman* v. *Dixon*, 406.

(DEFICIENCY OF ASSETS.) *Brandon* v. *Allison*, 532.

(REMEDY OF EXECUTION-CREDITOR.) *Isler* v. *Andrews*, 71, 552.

QUIT-CLAIM:

See INJUNCTION, 4.

QUO WARRANTO:

See MANDAMUS, 3.

RAILWAY COMPANIES:

See CARRIERS.

REALITY, ACTIONS TO RECOVER:

See TENANTS AND TENANCY.

REBELLION:

See ILLEGAL CONSIDERATION, 1, 2, 3, 6.

AMESTY, 1, 5.

RECEIVER:

1. The power to appoint a receiver is necessarily inherent in a Court which possesses equitable jurisdiction, and it is exercised when an estate or fund is in existence, and there is no competent person to hold it, or the person so entitled is in the nature of a trustee, and is misusing or misapplying the property. The Code of Civil Procedure does not materially change the equitable jurisdiction of our Courts on the subject.—C. C. P., sec. 215.

2. On the principle of protection, a receiver may be appointed at an Infant's estate if it be not vested in a trustee; and when there is a mixture of property and the different interests of the parties cannot be ascertained until proper invoices are made, and a division effected under the direction of the Courts—Adams' Equity, 352–53; 1 Parsons on Contract. *Skinner* v. *Maxwell*, 45.

3. A Court of Equity has the power to appoint a receiver for the purpose of securing and protecting property, which is the subject of litigation. He is an officer of the Court and his possession of the property is the possession of the Court. He holds such property as a custodian, until the rightful claimant is ascertained by the Court, and then for such claimant.

4. A receiver cannot commence any action for the recovery of property without an order of the Court, and when such order is made, the action must be brought in the name of the legal owner, and he will be compelled to allow the use of his name upon being properly indemnified out of the estate and effects under the control of the Court.

5. The power of a receiver to bring an action is regulated by the rules of a Court of Chancery. An order to sue in his own name cannot be given by our Courts, and the United States Courts cannot confer

upon him greater powers or privileges as a suitor in the State Courts. *Battle* v. *Davis*, 252.

RECORD, ESTOPPEL BY:
See ESTOPPEL, 1, 2.

RECOGNIZANCE:
See CRIMINAL PROCEEDINGS.

RECORDARI:
See PRACTICE—CODE, 25.

RECOUPMENT:
See FRAUD.
EVIDENCE, 2.

REFINEMENT:
See INDICTMENT, 8, 8.

REGISTRATION:
Between 1860 and 1865, there was no period when a deed made in 1860 could not have been registered, *Isler* v. *Foy*, 547.

REMOTENESS:
See CARRIERS OF GOODS, 5.

REMOVAL OF HOUSE:
See CRIMINAL ACTION.

RETAILING:
See CRIMINAL ACTION.
INDICTMENT.

RETAINING POSSESSION AFTER SALE:
See TENANTS AND TENANCY, 2.

RETENTION OF GOODS:
See AGENCY, 6.

REVISED CODE CONSTRUED:
CHAP. 3. Gibbs *v.* Fuller, 116.
CHAP. 35. State *v.* Wise, 120.
CHAP. 1, Secs. 9, 10, 11. Kesler *v.* Smith, 154.
CHAP. 108, Sec. —. Kingsbury *v.* C. R. R. Co., 284.
CHAP. 101, Sec. 24. Nobles *v.* Langly, 287.
CHAP. 62, Sec. 15. Froneburger *v.* Lee, 333.
CHAP. 50, Sec. 15. Norton *v.* Edwards, 367.
CHAP. 99, Sec. 53. Gore *v.* Masten, 372.
CHAP. 31, Secs. 57 and 16. Reece *v.* Reece, 377.
CHAP. 38, Secs. 1, 2, 3. Cromartie *v.* Kemp, 382.
CHAP. 71, Sec. 15. Green *v.* Wynne, 531.
CHAP. 37, Sec. 30. Isler *v.* Andrews, 554.
CHAP. 31, Sec. 130. State *v.* Parker, 624.
CHAP. 24, Sec. 103. State *v.* Roseman, 635.
CHAP. 12. State *v.* Beatty, 649.

REVISED STATUTES CONSTRUED:
CHAP. 37, Secs. 9, 10. Woodbourne *v.* Gorrell, 84.

REVOCABLE AND IRREVOCABLE LICENSE:
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RULE ON ATTORNEY:
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RULE, DEATH OF PARTY TO:
See SHERIFF, &c.

RULE ON SHERIFF:
See SHERIFF, &c.

RULES OF THE SUPREME COURT CONSTRUED:
See ISSUES, Settlement of.

SALE UNDER EXECUTION:
See SHERIFF, &c.

SCHOOL HOUSE, INJURY TO:
See EVIDENCE—CRIMINAL, 16.

SEPARATE ESTATE:
The separate estate of a *feme covert* is chargeable with her contracts, for money borrowed with the assent of her trustee, upon the credit and for the improvement of such estate, although the estate is not charged by, or referred to, in the contract. *Withers* v. *Sparrow*, 129.

SETTING ASIDE VERDICT:
See CRIMINAL PROCEEDINGS.

SETTLEMENT OF ESTATES:
See JURISDICTION—PROBATE COURTS, 1, 2.

SETTLEMENT OF ISSUES, ORDERS ON, NOT APPEALABLE:
See ISSUES, Settlement of.

SET OFF:
See COUNTER CLAIM.

SHERIFF, RIGHTS AND DUTIES OF:
1. A sheriff, on a sale by him under execution, can demand *cash* of the purchaser, and on his refusal to pay it (even though such purchaser, as an execution creditor, is entitled to the proceeds of sale, less the cost, and offered to pay cash to the amount of the costs and entered satisfaction for the residue), may immediately resell.
2. Whether a sheriff so acting, arbitrarily, does not subject himself to an action, *quere.*
3. It seems that on a rule against a sheriff, at the instance of such bidder to show cause why he should not execute a deed, the purchaser at a resale of the property ought to be made a party.
4. And, on the death of such sheriff, by virtue of the provisions of the Revised Code, chap. 37, sec. 30, the rule should be served on his successor.
5. Before such successor can be required to convey to such first bid-

der, he is entitled to demand clear and conclusive evidence that a sale was made by his predecessor, and also that the price was paid to him.

6. The natural evidence thereof is the return, though it seems that other evidence may be received. *Isler* v. *Andrews*, 553.

SHERIFF, SALE BY:

See SHERIFF, &c.

SILENCE:

See ESTOPPEL, 5.
AGENCY, 6.

SIMPLE CONTRACT-CREDITOR, RIGHT OF:

See ADMR'S AND EXR'S, 15, 16.

SPECIAL PROCEEDINGS:

1. A demand for dower is a special proceeding, returnable before the Clerk. *Felton* v. *Elliott*, 195.

2. A petition to make real estate assets is a special proceeding, and is properly brought before the Judge of Probate. *Badger* v. *Jones*, 305.

SPECIFIC PERFORMANCE:

See LICENSE, 4.

STATE NOT ENTITLED TO APPEAL:

See CRIMINAL PROCEEDINGS.

STATE NOT ENTITLED TO NEW TRIAL:

See CRIMINAL PROCEEDINGS.

STATUTES, CONSTRUCTION OF:

1. To give operation to the maxim *leges posteriores, priores contrarias abrogant*, the latter law must be in conflict with the former, therefore, when a later statute is almost *in ipsissimis verbis* with a former one; *Held*, that there was no repeal of the former.

2. The statute. Rev. Code, chap. 1, secs. 9, 10, 11, is not repealed by Acts 1868-'69, chap. 113, secs. 70, 71, 72, 114. *Kesler* v. *Smith*, 154.

STATUTES CONSTRUED:

ACTS (CONTEMPT) 1868-'69, Chap. 177, Par. 8.
Kane v. Haywood, 1.

ACT (PROCESS AGAINST COUNTIES) 1868, Chap. 20.
Askew v. Pollock, 49.

ACT (R. R. PROXIES) 1870-'71, Chap. 283.
Clark v. Stanly, 59.

ACTS (EXCHANGE OF BONDS) 1859, 1861, 1870.
W., C. & R. R. R. Co. v. W. R. R. Co., 90.

ACT (CRIMINAL PROCEDURE) 1868-'69, Chap. 178.
State v. Mathews, 106.

ACTS (ARSON—Punishment for) 1868-'69, Chap. 167—1870-'71, Chap. 222.
State v. Wise, 120.

ACT (AMNESTY) 1866-'67, Chap. 3.
Franklin v. Vannoy, 145.

ACTS (INJURY CAUSING DEATH) 1868-'69, Chap. 113, Secs. 70, 71, 72, 114.
Kesler v. Smith, 154.

ACTS (DOWER) 1866–'67, Chap. 54, 1868–'69, Chap. 93.
Sutton v. Askew, 172.
Wesson v. Johnson, 189.
Bunting v. Foy, 193.
Felton v. Elliott, 195.

ACTS (HOMESTEAD) 1868–'69, Chap. 137.
Watts v. Leggett, 197.

ACTS (SCALE) 1866–'67, Chap. 50.
Terrell v. Walker, 244.
King v. W. & W. R. R. Co., 277.
Bank v. Britton, 365.

ACT (BANKRUPT) March 2d. 1867.
Whiteridge v. Taylor, 273.
Clerk's Office v. Bank, 214.

ACTS (VENUE) 1868–'69, Chap. 257.
Kingsbury v. Chatham R. R. Co., 284.

ACTS (SALE BY HEIR) 1868–'69, Chap. 113.
Badger v. Jones, 305.

ACTS (POWER OF MAYORS) 1868–'69, Chap. 178, Sub-Chap. 2.
State v. Pender, 313.

ACTS (CONVEYANCE OF CONVICTS) 1869–70, Chap 180. 1870–'71, Chap. 124, Section 3.
Taylor v. Adams, 338.

ACTS (KILLING STOCK) 1856–'57, Chap. 7.
Battle v. W. & W. R. R. Co., 343.

ACTS (AUDITOR'S WARRANT) 1868–'69, Chap. 270, Sec. 71.
Bayne v. Jenkins, 356.

STATUTES—INTERPRETATION OF:

1. To give operation to the maxim *leges posteriores, priores contrarias abrogant* the latter law must be in conflict with the former, therefore, when a latter statute is almost *in ipsisimis verbis* with a former one, *held*, that there was no repeal of the former.

2. The statute, Rev. Code, chapter, 1, sections 9, 10, 11, is not repealed by Acts 1868–'69, chapter 113, sections 70, 71, 72, 114. *Kesler* v. *Smith*, 154.

STATUTES OF LIMITATIONS:

See CRIMINAL PROCEEDINGS.

STATUTES UNCONSTITUTIONAL:

See CONSTITUTIONAL LAW.

STIPULATIONS:

See CONDITIONS PRECEDENT.
JUDGE'S CHARGE, 1.

SUBJECT OF LARCENY:

See CRIMINAL ACTIONS.

SUPERIOR COURTS:

See PRACTICE—SUPERIOR COURTS.
JURISDICTION—SUPERIOR COURTS.

SUPREME COURT JURISDICTION:

See PRACTICE—SUPREME COURT.

SUPREME COURT—PRACTICE IN:

See PRACTICE IN SUPREME COURT.

SUPPLEMENTARY PROCEEDINGS:

1. Where a debtor executes a deed in trust to a trustee to secure certain debts therein mentioned, and after the registration of the deed a creditor obtains judgment and has the same duly docketed; the judgment under the provisions of C. C. P., sec. 254, 503, is a lien upon the equitable estate of the debtor.
2. The lien thus acquired cannot be enforced by a sale under execution. In order to sell an equitable estate not liable to a sale under execution, the plaintiff in the execution must resort to his action (as formerly, to bill in equity), to ascertain the rights of all parties interested and to enforce his lien.
3. The purpose of the C. C. P., secs. 264, 266, was to give a remedy by "Proceedings Supplemental to Execution," to a plaintiff only in case the defendant had no known property liable to execution, or to what is in the nature of execution, proceedings to enforce a sale to satisfy the debt.
4. Supplemental proceedings may be commenced before the sale of the property levied on, on affidavit, or other proof of its insufficient value. But no final order can be made, appropriating to the creditor any property discovered, until the property previously levied on has been exhausted. *McKeithan* v. *Walker*, 95.

SURETY:

1. If a creditor enters into any valid contract with a principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety. Mere delay on the part of the creditor to sue for or collect the debt, or even his refusal to do so, when requested by his surety, or his express promise of indefinite indulgence, does not discharge the surety.
2. When a creditor held a note given in 1859, and the principal debtor proposed to pay the same in Confederate money in 1863, which the creditor declined to receive, but made an agreement that if the debtor would postpone the payment interest should cease "from that time until a demand," *held*, that such an agreement did not amount to forbearance for any definite or specified time, nor increase the risk of the surety in any way, and could not therefore discharge him from liability. It would seem that if the agreement had been to forbear until the end of the war, it would have been *nudum pactum*, and therefore not binding. *Deal* v. *Cochran*, 269.

SURVEY—WARRANT OF:

See CRIMINAL ACTIONS.
FRAUD, 7.

TAXATION:

1. The Commissioners of a county have no right to exceed the double of the State tax, except:

   (1.) To pay debts of the county, legally contracted before the adoption of the Constitution.

   (2.) When the tax is for a special purpose, and has been allowed by an Act of the General Assemby. *Simmons* v. *Wilson*, 336.

2. The General Assembly have an unlimited right to tax all persons domiciled within the State, and all property within the State, except so far as this right has been limited by the provisions of the Constitution, either by express words or by necessary implication.

3. The General Assembly has, under this general power, the right to tax legacies, collateral descents, etc., and when such a tax is imposed upon the succession, or on the right of the legatee to take under the will, the power is not restrained or limited by the provisions of the Constitution relative to the tax on property.

4. Therefore, the Revenue Act of 1870-'71, imposing a tax on legacies, etc., is not unconstitutional, yet it cannot be restrospective in its character. *Pullen* v. *Commistioners*, 361.

TAXES:

See TAXATION.

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TENANTS AND TENANCY:

1. Where a person had become tenant from year to year to a mortgagor, before the execution of the mortgage deed, in which three, four and five years had been given for the payment of equal installments of the bonds secured by it, and afterwards had become the tenant of the mortgagor's right of redemption: *It was held*, that though four years had elapsed from the date of the mortgage, and no payment had been made on the bonds, yet the mortgagee could not recover the possession of the land from such tenant without giving him a reasonable notice to quit; and further, that he was not bound to give him six months' notice, because of his attornment to a landlord other than a mortgagor. *Hemphill* v. *Giles*, 512.

2. A bargainor in a deed in trust, containing a stipulation, for the retention of the possession of the land conveyed, until sold under the terms of the trust, who holds possession after a sale of the premises by a trustee is not such a tenant as comes within the purview of the Landlord and Tenant Act (Acts of 1868-'69, chap. 156), and hence proceedings cannot be taken under that act to evict him.

3. The act was only intended to apply to a case in which the tenant entered into possession under some contract of lease, either actual or implied, with the supposed landlord or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered.

4. The construction excludes from the operation of the act, two classes, viz.: vendees in possession under a contract for title, and vendors retaining possession after a sale, though such persons are certainly tenants at will or sufferance for some purposes, and frequently so styled. *McCombs* v. *Wallace*, 587.

TESTAMENTARY CAPACITY:

See MENTAL CAPACITY.

"TITLE," EFFECT OF WORD IN PLEADING:

See ESTOPPEL, 2, 3.

TITLE IN FORCIBLE TRESPASS:

See EVIDENCE—CRIMINAL, 16.

"TIME":

See CRIMINAL PROCEEDINGS:

TRIAL BY JURY:

In all actions under the C. C. P., where legal rights are involved, and issues of fact are joined by the pleadings, the plaintiff is entitled to a trial by jury, and cannot be deprived of this right, except by his consent. *Andrews* v. *Pritchett*, 387.

"TRICK":

See CRIMINAL ACTION.

TORT—HOMESTEAD.

A homestead and personal property exemption, under Art. X of the Constitution, and the laws passed in pursuance thereof, cannot be sold under an execution, issued upon a judgment rendered in an action *ex delicto*. *Dellinger* v. *Tweed*, 206.

TORTS:

See TORT—HOMESTEAD.

TREATY OF PEACE:

See CONDITION PRECEDENT.

TRESPASSER:

See MORTGAGE.

TRUSTS AND TRUSTEES:

1. A trustee, in the execution of his trust, is bound to carry out honestly and faithfully the purposes contemplated by the grantor, to keep an account of receipts, disbursements, &c., and be ready to produce his accounts, when required by the parties interested in the estate.

2. Where the facts connected with the management of a trust estate, are in dispute, and the rights of the parties cannot readily be ascertained without an account, in such case the rule adopted by Courts of Equity, is a reference to the Master, and if there is dissatisfaction with the report, the matter may be brought before the Court by proper exceptions. *Martin* v. *Wilburne*, 321.

TRUST ESTATES:

1. When the legal estate in land is not conveyed, a trust cannot be raised by parol, even founded on a valuable consideration, and though followed by actual occupancy, and the erection of valuable improvements. *Frey* v. *Ramsour*, 466.

TURKEY:

See CRIMINAL ACTIONS.

TWO JOINTLY INDICTED FOR RETAILING:

See CRIMINAL ACTIONS.

UNITED STATES COURT, EFFECT OF ITS PROCESS:

See CONFLICT OF JURISDICTION.

UNDUE INFLUENCE:

See MENTAL CAPACITY, 2.

"UBERIMA FIDES:"

See ESTOPPEL, 8.

VARIATION OF CONTRACT:

See JUDGE'S CHARGE, 5, 6, 7.

VENDOR AND VENDEE:

1. A vendor who contracts to convey upon payment of the purchase money is, as between the parties, a mortgagee.
2. It is well settled that a mortgagee possesses two remedies which he may prosecute at the same time, namely, one *in personam*, the other *in rem*, to subject the mortgaged property to its payment by foreclosure.
3. A resort to the first does not amount to a waiver of the second, or *vice versa*.
4. The two actions are not for the same cause, and a different relief is obtained in each; and this continues to be the case, notwithstanding that a single Court grants all the relief which was formerly sought in two. *Ellis* v. *Hussey*, 501.

VENUE OF ACTIONS:

1. The Act of the General Assembly of 1868–'69, chap. 257, requiring that " the *venu* in actions against railroad companies, shall be laid in some county wherein the tract of said railroad, or some of it, is situated," is not in conflict with sec 7, Art. I, of the Constitution. The jurisdiction of the Courts, and the *venue* of actions have always been subject of legislation.
2. The " repeal of a statute shall not affect any suit brought before the repeal, for any forfeiture incurred, or for the recovery of any rights accruing under such statute:" Rev. Code, ch. 108, sec. 1.
3. The question as to where a case ought to be tried, is preliminary to the trial, and must be determined by the Judge. And this question can be as well tried on a motion to dismiss, (the facts being verified by affidavits) as upon a plea to the jurisdiction. *Kingsbury* v. *Chatham Railroad Co.*, 284.
4. A writ issued from the Superior Court of one county cannot be made returnable unto the Superior Court of another county. *Howerton* v. *Tate*, 441.

VERDICT:

See CRIMINAL PROCEEDINGS.

WAIVER OF REMEDY:

See VENDOR AND VENDEE.

WAIVER OF TORT:

See JURISDICTION—SUPERIOR COURT, 1.

WAR:

See ILLEGAL CONSIDERATION, 3, 5, 6.

AMNESTY, 1, 5.

WARRANTY:

1. In action for deceit and false warranty, after evidence by plaintiff that he discovered the alleged unsoundness (glanders) early next morning after the sale, it is competent, by way of impeaching such testimony, for the defendant to prove by a witness that he and plaintiff lived in a very small village, [Boone] and within fifty yards of each other, and that he (witness) did not hear of the alleged unsoundness until some *two weeks* after the sale.
2. Evidence, by way of dialogue, *in haec verba:*

Plaintiff—"What will take for your mule?"
Defendant—"One hundred and twenty-five dollars."
Plaintiff—"I can't give $125, but if it is all sound and right I will give you $100.
Defendant—"It is all sound and right, and I will take $100 if you will pay the money down."
Plaintiff—"I cannot pay the money all down, but will pay $25 down and give my note and security for the balance."
Defendant—"I agree, here's your mule"
—does not *per se* constitute a warranty, but is only evidence for the jury, to be weighed by them in connoction with the surrounding circumstances of the transaction.

3. Among these circumstances may be considered the tone, looks, gestures and the whole manner of the transaction.

4. The doctrine upon special contracts of personalty and the point whether the question of warranty is to be decided by the Court or left to the jury with the proper instructions, has been too long and too thoroughly settled in this State, to be now overturned by decisions in other Courts, and this Court is satisfied with the reasoning and adheres to the former decisions. *Horton* v. *Green*, 596.

WARRANT OF JUSTICE:

See CRIMINAL PROCEEDINGS.

WARRANT OF SURVEY:

See CRIMINAL ACTIONS,

WIDOW:

See DOWER.

WILLS:

A paper-writing, written in any form, whether as a deed or gift, deed poll or indenture, may be propounded as a will, and operates as such if it appears to have been the purpose of the maker of such instrument that it should take effect after his death. The words, "I give at my death," are operative words, and evidence testimentary intent. *Belcher's Will*, 51.

WILLS, CONSTRUCTION OF:

1. A will is made in these words: I direct that my debts and funeral expenses be paid. I will and bequeath to my son, Peter A. Summey, twenty-five hundred dollars. I will and bequeath to my wife, Harriet Caroline, my house and lot in Lincolnton in which I now live, my plantation about a mile from Lincolnton, and my household and kitchen furniture, for and during her natural life, and a sufficient quantity of property or money for a year's support for herself and family. I also will absolutely to my wife the following slaves, Sophia, &c., also all the balance of my estate both real and personal, with the remainder after my wife's death, in my house and lot, plantation and kitchen furniture, to be equally divided between my children, George L. Summey, Caroline Dusenberry, Barbara Alexander and Peter A. Summey, with the understanding, that the negroes I have already given to my son George shall be taken into account in said distribution. * * * * * * *held*, that the leading idea in the testator's mind was to make all of his children equal with an advantage to his son, Peter A. Summey, to the extent of $2,500.

2. The will having been made in September, 1864, when Confederate money had become so depreciated as not to deserve the name of a

currency; to construe the legacy to Peter as payable in Confederate currency would be to "mock" the legatee, therefore, *held*; Peter's legacy must be estimated at its nominal value in good money.

3. On the other hand, the major part of the testator's estate having consisted of slaves which were lost by emancipation, it would not carry out the testator's intention to pay Peter's legacy in full, and leave nothing for the other legatees, therefore, *held*, that Peter's legacy must abate proportionally.
4. The rule of proportion is: To ascertain the value of the whole estate at testator's death, and the proportion that Peter's legacy of $2,500 bore to that sum, is the proportion it bears to the estate as reduced.
5. After deducting the sum due Peter on the legacy, as thus abated, the balance is to be divided into three parts, between the daughters and Peter unless George shall elect to bring his advancements into hotchpot, in which case the remainder must be divided into four parts. *Alexander* v. *Summey*, 578.
6. Where a Judge, in response to a prayer for special instructions, complied strictly therewith, it cannot be error. More especially, when his charge is quite as favorable as the testimony warrants.
7. Whether under the words "my plantation," used in a will, all lands contiguous to the home-place of the testator, will pass, *quere*. *McLennan* v. *Chisholm*, 100.

WITNESS:

See JUDGE'S CHARGE.

EXPERTS, &C.

This book must
not be taken
from the building